(1)

No. 92-6921-CFY
Status: GRANTED

Title: John Patrick Liteky, Charles Joseph Liteky and Roy Lawrence Bourgeois, Petitioners
v.
United States

Docketed:
December 14, 1992

Court: United States Court of Appeals for the Eleventh Circuit

Counsel for petitioner: Thompson,Peter

Counsel for respondent: Solicitor General

Entry	Date	Note	Proceedings and Orders
1	Dec 14 1992	G	Petition for writ of certiorari and motion for leave to proceed in forma pauperis filed.
4	Feb 16 1993		Order extending time to file response to petition until March 18, 1993.
5	Mar 15 1993		Brief of respondent United States in opposition filed.
6	Mar 18 1993		DISTRIBUTED. April 2, 1993
8	Mar 26 1993	X	Reply brief of petitioners John Patrick Liteky, et al. filed.
7	Mar 30 1993		Record requested -- WHR.
9	May 4 1993		Record filed.
		*	Certified record on appeal from USCA/11 and USDC, MiddleDistrict of Georgia (1 folder)
10	May 6 1993		REDISTRIBUTED. May 21, 1993
12	May 24 1993		Petition GRANTED.
			**********
13	Jun 7 1993	G	Motion of petitioners for appointment of counsel filed.
14	Jun 28 1993		Motion for appointment of counsel GRANTED and it is ordered that Peter Thompson, Esquire, of Minneapolis, Minnesota, is appointed to serve as counsel for the petitioners in this case.
15	Jul 8 1993		Brief of petitioners John Patrick Liteky, et al. filed.
16	Jul 12 1993		Joint appendix filed.
19	Aug 19 1993		Order extending time to file brief of respondent on the merits until August 20, 1993.
20	Aug 20 1993		Brief of respondent United States filed.
21	Sep 9 1993		CIRCULATED.
22	Sep 10 1993		SET FOR ARGUMENT WEDNESDAY, NOVEMBER 3, 1993.(2ND CASE).
23	Sep 20 1993	X	Reply brief of petitioners filed.
24	Oct 29 1993		LODGING by respondent. One copy of trial transcript in United States v. Ventimiglia.
25	Nov 3 1993		ARGUED.

No. 92-6921

IN THE SUPREME COURT OF THE
UNITED STATES

October Term, 1992

ORIGINAL

ROY LAWREUCE BOURGEOIS,
CHARLES JOSEPH LITEKY, and
JOHN PATRICK LITEKY,

Petitioners,

vs.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

By: Peter Thompson, 109344
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Attorneys for Petitioners

1992 – BACHMAN LEGAL PRINTING, 835 Second Avenue South, Minneapolis, MN 55402 – (612) 339-9518 ■ FAX 612-337-8053

QUESTION PRESENTED FOR REVIEW

DOES 28 U.S.C. §455(a), WHICH PROVIDES THAT "ANY JUDGE...SHALL DISQUALIFY HIMSELF IN ANY PROCEEDING IN WHICH HIS IMPARTIALITY MAY REASONABLY BE QUESTIONED," REQUIRE THAT THE CAUSE OF THE APPARENT BIAS STEM FROM AN EXTRA-JUDICIAL SOURCE?

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OPINION BELOW

This Petition for Certiorari arises from the judgment of the Eleventh Circuit Court of Appeals dated September 28, 1992 which affirmed the decision of the United States District Court for the Middle District of Georgia.

JURISDICTION

Petitioners John Liteky, Patrick Liteky and Roy Bourgeois were convicted of willfully injuring federal property in violation of 18 U.S.C. §1361. The United States Court of Appeals for the Eleventh Circuit affirmed the decision of the District Court in a published Opinion filed September 28, 1992. This Court has jurisdiction to review the judgment of the Court of Appeals by Writ of Certiorari pursuant to Title 28 U.S.C. §1254(1).

FEDERAL STATUTE INVOLVED

Title 28 U.S.C. §455(a) provides:

> Any justice, judge, or magistrate of the United States shall disqualify himself in any proceeding in which his impartiality might reasonably be questioned.

STATEMENT OF THE CASE

Charles Liteky, John Liteky and Father Roy Bourgeois entered Fort Benning Military Reservation on November 16, 1990 and doused the Army School of the Americas in blood. Their actions were provoked by School of the Americas' trainees who killed six Jesuit priests and two other civilians in El Salvador on November 16, 1989. (T. 184-85; 220-28; 250; 270; 276). Defendants were tried for willfully injuring government property before District Court Judge J. Robert Elliott.

In 1983, Judge Elliott presided over another criminal case where Father Bourgeois was tried on six misdemeanors for protests at Ft. Benning. In a pretrial Motion for Recusal in the 1991 trial, Bourgeois alleged that Judge Elliott's intemperate remarks during the 1983 trial reflected a personal bias against him and raised an appearance of bias in favor of the government in civil disobedience cases. A copy of the 1983 transcript was submitted. The District Court refused even to consider Bourgeois' allegations. Rather, Judge Elliott held, in written opinion, that the Court was not permitted, as a matter of law, to consider any bias which arose in connection with a judicial proceeding. (Order on Motion, p. 1, Appendix A-19).

During the defendants' trial, Judge Elliott frequently confronted the defendants, belittled and demeaned their deeply held religious convictions, and refused to allow them to testify about material facts. Following one such outburst from the Bench, Bourgeois' attorney reiterated the defense request for recusal. Judge Elliott again denied the Motion. (T. 201).

The defendants appealed the District Court's denial of their Motion for Recusal to the United States Court of Appeals for the Eleventh Circuit, arguing that judicial bias

need not stem from an extra-judicial source for the purposes of 28 U.S.C. §455(a). The Eleventh Circuit rejected defendant's argument on appeal. In contrast to other Circuit Courts of Appeal to consider the question recently, the Eleventh Circuit held that "matters arising out of the course of judicial proceedings are not a proper basis for recusal." United States v. Liteky, 973 F.2d at 910 (11th Cir. 1992).

REASONS FOR GRANTING THE WRIT

The Eleventh Circuit decision in United States v. Liteky, and the Fifth and Ninth Circuit opinions on which it was based, are in direct conflict with a recent, well reasoned decision of the First Circuit, United States v. Chantal, 902 F.2d 1018 (1st Cir. 1990). The Liteky ruling also conflicts indirectly with recusal decisions in Haines v. Liggett Group, 975 F.2d 81 (3rd Cir. 1992) and several other decisions involving the supervisory power of the courts of appeals to remove district court judges. The Liteky holding is also at odds with 28 U.S.C. §455(a)'s legislative history, the reasoned opinions of all commentators to consider the issue, and risks injustice in a wide array of future judicial recusal and supervisory removal cases.

28 U.S.C. §455 provides in relevant part:

> a). Any justice, judge, or magistrate of the United States shall disqualify himself in any proceeding in

> which his impartiality might reasonably be questioned.
>
> b). He shall also disqualify himself in the following circumstances:
>
> 1. Where he has a personal bias or prejudice concerning a party, or personal knowledge of disputed evidentiary facts concerning the proceeding;

Courts apply different standards of proof to subsections (a) and (b) in determining whether disqualification under §455 is required.

Section 455(a) requires disqualification in any proceeding in which the judge's impartiality "might reasonably be questioned." In the Ninth Circuit, the test for disqualification under this subsection is:

> Whether or not given all the facts of the case there are reasonable grounds for finding that the judge could not try the case fairly either because of the appearance or the fact of bias or prejudice. United States v. Conforte, 624 F.2d 869, 881 (9th Cir.), cert. denied, 449 U.S. 1012 (1980).

This standard is an objective standard requiring disqualification "if there is a reasonable factual basis for doubting the judge's impartiality." Id, quoting H. R. Rep. No. 1453, 93rd Cong., 2nd Sess., reprinted in [1974] U.S. Code Cong. & Ad. News 6351, 6354.

On the other hand, disqualification under §455(b) is not based on an objective standard but requires a showing of actual bias in fact. On this point the circuits are in agreement. See, United States v. Chantal, 902 F.2d 1018, 1023 (1st Cir. 1990), and United States v. Conforte, 624

F.2d at 881. Also, the courts are in agreement that the "bias in fact" standard of §455(b) requires that the source of bias be extra-judicial. See, id.

The point over which the United States Courts of Appeals are irreconcilably divided is whether bias which results from a judge's involvement in judicial proceedings can require recusal under §455(a). Compare, e.g., Liteky, 973 F.2d at 910 (bias acquired during previous case involving defendant is irrelevant under §455(a)); Davis v. Board of School Comm'rs., 517 F.2d 1044, 1051 (5th Cir. 1976) (bias must stem from extra-judicial source to justify recusal); United States v. Sibla, 624 F.2d 864 (9th Cir. 1990) (§455(a) only requires recusal in cases of personal, non-judicial bias) with United States v. Chantal, supra (appearance of bias arising in the course of a previous similar case requires recusal); Nicodemus v. Chrysler Corp., 596 F.2d 152 (6th Cir. 1979) (reversing a district court decision and disqualifying the judge from further participation in the case due to an appearance of bias arising in the course of a pretrial hearing).

The circuit split is so clear and well defined that Senior Circuit Judge John R. Brown of the Fifth Circuit, sitting by designation for the Chantal appeal, commented "Lest I commit myself to judicial harakari I hastily acknowledge that at home I must and will follow the Fifth Circuit's holdings . . . which from the vantage of the First

Circuit is wrong." 902 F.2d at 1022, n. 10. These inconsistencies were recently recognized by two Justices of this Court, Justice White and Justice O'Connor, who dissented in denying a writ of certiorari to the Ninth Circuit in a case which presented the very same issue. See, Walker v. United States, ___ U.S. _____, 1112 S.Ct. 2321, 119 L.Ed.2d 239 (1992).

Chantal, supra is directly on point to the situation in Liteky. In Chantal, the district judge issued strong condemnation of the defendant during the sentencing phase of a prior criminal trial. The defendant moved for recusal under §455(a), citing the judge's apparent bias against him. The district judge, like the district judge in Liteky, refused to consider the merits of defendant's motion and held that judicially acquired bias was not grounds for recusal under §455(a). 902 F.2d 1019-20. The First Circuit reversed, holding that the proper inquiry under §455(a) was whether or not there was an appearance of bias. Where the bias arose, Chantal reasoned, is completely irrelevant. 902 F.2d at 1022-24. Although Liteky declined to offer any justification for its decision to require an extra-judicial source, or even mention the First Circuit's contrary conclusion, the two decisions are in direct conflict.

Liteky, and the Fifth Circuit decisions on which it is based, are also philosophically at odds with the recent decision in Haines v. Liggett Group, 975 F.2d 81 (3rd Cir.

1992). Haines, supra, exercised its supervisory powers to remove the district court judge. The Third Circuit took this extraordinary remedy in light of the district court judge's "statements contained in the opinion that is the subject of this petition." 975 F.2d 97. Haines and Chantal also find support in United States v. Coven, 662 F.2d 162 (2nd Cir. 1981), cert. denied, 456 U.S. 916 (1982), which held that appearance of partiality, either judicially acquired or personal, requires removal of the district judge. Similarly, Roberts v. Bailar, 625 F.2d 125 (6th Cir. 1980) vacated and remanded a district court decision and disqualified the judge as a result of the judge's conduct during a pretrial hearing.

Haines, supra, took pains to point out that the test for supervisory removal is the appearance of impartiality. The test "is not our subjective impressions of [the district judge's] impartiality gleaned after reviewing his decisions these many years; rather, the polestar is 'impartiality and the appearance of impartiality." Haines, 975 F.2d at 98. Importantly, this is exactly the same test for recusal under §455(a). 28 U.S.C. §455(a) (1988); see also, Potashnick v. Port City Const. Co., 609 F.2d 1101, 1111 (5th Cir.), cert. denied, 499 U.S. 820 (1980) (§455(a) is governed by an appearance of impartiality standard).

Haines reasoned that it did not matter whether the appearance of bias arose in a judicial proceeding, an

opinion very much at odds with Liteky. The position articulated in Haines is irreconcilable with the extra-judicial source requirement promulgated by the Fifth, Ninth and Eleventh Circuits. Haines, decided after certiorari was denied in Walker, underscores the conflict among the circuits with regard to judicially acquired bias and the need for Supreme Court guidance on this issue.

In large part, the confusion surrounding §455(a) stems from a misunderstanding of the interrelationship between the two federal recusal statutes: §455(a) and 28 U.S.C. §144 (1988).

Prior to the adoption of 28 U.S.C. §455 in its present form, recusal was governed by 28 U.S.C. §144, which provides:

> Whenever a party to any proceeding in a district court makes and files a timely and sufficient affidavit that the judge before whom the matter is pending has a personal bias or prejudice either against him or in favor of an adverse party, such judge shall proceed no further therein, but another judge shall be assigned to hear such proceeding. 28 U.S.C. §144 (1988).

Courts have uniformly held that the language "personal bias or prejudice" referred to bias personally acquired, as opposed to judicial bias. See, Bloom, Judicial Bias In Financial Interest As Grounds Of Disqualification Of Federal Judges, 35 Case Western Reserve L.Rev. 663, 670-76 (1985) [hereinafter Bloom]. Thus, for "[t]he alleged bias and prejudice to be disqualifying [it] must stem from an

extra-judicial source and result in an opinion on the merits on some basis other than what the judge learned from his participation in the case." United States v. Grinnell Corp., 384 U.S. 563, 583 (1966).

In 1974, Congress amended §455 for the express purpose of broadening and clarifying the grounds for judicial disqualification. H. R. Rep. No. 1453, 93rd Cong., 2d Sess. 2, reprinted in 1974 U.S. Code Cong. & Ad. News 6351, 6352. Importantly, §455(a) does not include language which requires a "personal bias or prejudice," but rather provides:

> Any justice, judge, or magistrate of the United States shall disqualify himself in any proceeding in which his impartiality might reasonably be questioned. 28 U.S.C. §455(a).

Congress amended §455(a) to liberalize the recusal process in a number of ways. Id; Bloom, supra, at 672. First, §455(a) operates to increase public confidence in the judicial system by ensuring that the judges recuse themselves wherever there is "an appearance of impartiality," as opposed to actual judicial bias. Potashnick, 609 F.2d at 1111; Roberts v. Bailar, 625 F.2d 125, 129 (6th Cir. 1980). Furthermore, the 1974 Amendments changed §455 to ensure that it was applied through an objective, reasonable person standard, rather than a judge's subjective determination of bias in fact. Chantal, 902 F.2d at 1023. The 1974 Amendments also require a district judge to recuse himself whenever there is any question about the court's

impartiality. Under the new §455, "[e]ven where the question is close, the judge whose impartiality might reasonably be questioned must recuse himself from the trial." Roberts, 625 F.2d at 129.

The 1974 Amendments to §455(a), which Congress expressly designed to liberalize the recusal requirements, also had the effect of abandoning the extra-judicial source requirement. All commentators to consider the question agree. Bloom, supra, at 670-676; Comment, Questioning The Impartiality Of Judges: Disqualifying Federal Court Judges Under 28 U.S.C. §455(a), 60 Temple L.Q. 697, 715-17 (1987) [hereinafter Temple Comment], p. 715-717. "The appropriate focus under §455(a) is not whether the judge's statement springs from an extra-judicial source but instead whether the judge's statement or action would lead a reasonable person to question whether the judge would remain impartial." Temple Comment, supra, at 717.

The current trend in the federal court system also supports a construction of §455(a) which requires recusal for judicially obtained bias. Chantal, 902 F.2d at 1021-1024; United States v. Coven, 662 F.2d at 168; Nicodemus, 596 F.2d at 155-56; United States v. Conservation Chem. Co., 106 F.2d 210, 234 (W.D. Mo. 1985). These well-reasoned decisions articulate the position that "the fact that the source of the judge's bias arises out of or originates in judicial proceedings [does not] immunize the judge from

the inquiry whether such factor would, in the mind of a reasonable person, raise a question about the judge's impartiality." Chantal, 902 F.2d at 1023-24.

In contrast, scholars have widely criticized Corrugated Container Antitrust Litigation, supra; and Davis, supra, the decisions upon which the Eleventh Circuit relied in denying defendants' appeal. See, Bloom, supra, at 675-76; Chantal, 902 F.2d at 1022-23. These decisions maintain that §455 is subject to the same legal tests and standards as §144, and conclude that the extra-judicial source requirements to §144 applies with equal force to §455. Corrugated Container Antitrust Litigation, 614 F.2d at 965; Davis, 517 F.2d at 1051.

These decisions are incorrect, however, in assuming that §455(a) and §144 are governed by the same legal standards. Rather, Congress enacted §455(a) for the express purpose of creating different, and more lenient, standards to govern the recusal process. Cf., United States v. Alabama, 828 F.2d at 1540-1541 (recognizing that the two recusal statutes have different affidavit requirements, that §455(a) did away with the "duty to sit" rule, that the burden of proof under §455(a) is much more lenient, providing for an objective, rather than subjective, standard for determining whether or not recusal is appropriate). Because the standards and procedures governing the application of §455(a) and §144 are completely different,

commentators have criticized the Fifth Circuit's conclusion that both should be governed by the same extra-judicial source requirement. The Fifth Circuit approach is inconsistent with §455's statutory language and legislative history. Bloom, supra, at 675-76; Temple Comment, supra, at 248-49.

Even more disturbing, by considering §144 and §455(a) in pari materia, the Eleventh Circuit in effect replaces the new "appearance of impartiality" standard with the old "bias in fact" standard used to evaluate recusal decisions prior to the passage of the 1974 Amendments. Bloom, supra, at 675-76. This approach is directly contrary to §455(a)'s unequivocal congressional mandate. Id. Supreme Court guidance is required to address the Eleventh Circuit's error.

CONCLUSION

Petitioners base this Petition on the fact that the Eleventh Circuit has departed from the better reasoned decision of the First Circuit in establishing an extra-judicial source requirement for recusal under 28 U.S.C. §455(a). The Eleventh Circuit approach is at odds not only with other United States Courts of Appeals, but also with the statutory language, the legislative history and traditional notions of fairness. For all the foregoing reasons, Petitioners

respectfully request the Court to review the judgment of the Eleventh Circuit Court of Appeals.

Dated: December 10, 1992

Respectfully submitted,

THOMPSON, LUNDQUIST & SICOLI, LTD.

By: Peter Thompson
Peter Thompson
2520 Park Avenue South
Minneapolis, Minnesota 55404
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Reg. No. 109344

Attorneys for Petitioners

APPENDIX

United States Court of Appeals

FOR THE ELEVENTH CIRCUIT

FILED
U.S. COURT OF APPEALS
ELEVENTH CIRCUIT
SEP 28 1992
MIGUEL J. CORTEZ
CLERK

No. 91-8577

District Court Docket No. CR91-93

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

versus

JOHN PATRICK LITEKY,
CHARLES JOSEPH LITEKY,
ROY LAWRENCE BOURGEOIS,

Defendants-Appellants.

Appeals from the United States District Court
for the Middle District of Georgia

Before ANDERSON, Circuit Judge, HILL and ESCHBACH*, Senior Circuit Judges.

J U D G M E N T

This cause came to be heard on the transcript of the record from the United States District Court for the Middle District of Georgia, and was argued by counsel;

ON CONSIDERATION WHEREOF, it is now hereby ordered and adjudged by this Court that the judgments of convictions of the said District Court in this cause be and the same are hereby AFFIRMED.

*Honorable Jesse E. Eschbach, Senior U.S. Circuit Judge for the Seventh Circuit, sitting by designation.

Entered: September 28, 1992
For the Court: Miguel J. Cortez, Clerk

By: Karleen McNabb
Deputy Clerk

ISSUED AS MANDATE: OCT 20 1992

UNITED STATES of America,
Plaintiff-Appellee,

v.

John Patrick LITEKY, Charles Joseph Liteky, Roy Lawrence Bourgeois,
Defendants-Appellants.

No. 91-8577.

United States Court of Appeals,
Eleventh Circuit.

Sept. 28, 1992.

Defendants were convicted in the United States District Court for the Middle District of Georgia, No. CR91-93-COL, J. Robert Elliott, J., of willfully injuring federal property, and they appealed. The Court of Appeals held that in protestors' prosecution for willful injury of government property, the district judge properly declined to recuse himself on the ground that he had presided over one of the defendant's prior conviction which also related to a protest regarding United States foreign policy.

Affirmed.

1. Judges ⇐49(1)

Matters arising out of the course of judicial proceedings are not a proper basis for recusal.

2. Judges ⇐47(2)

In protestors' prosecution for willful injury of government property, the district judge properly declined to recuse himself on the ground that he had presided over one of the defendant's prior conviction, which also related to a protest regarding United States foreign policy in El Salvador. 18 U.S.C.A. § 1361; 28 U.S.C.A. §§ 144, 455(a).

Appeals from the United States District Court for the Middle District of Georgia

Before ANDERSON, Circuit Judge, HILL and ESCHBACH*, *Senior Circuit Judges.*

PER CURIAM.

[1, 2] In 1990, Charles Liteky, Patrick Liteky, and Father Roy Bourgeois spilled blood on federal property as part of a protest against the United States' involvement in El Salvador. The defendants were convicted of violating 18 U.S.C. § 1361, which prohibits "willfully injur[ing] ... any property of the United States...." Before the trial, the defendants requested that the district judge recuse himself, *see* 28 U.S.C. § 144; 28 U.S.C. § 455(a), because he had presided over Father Bourgeois' 1983 conviction, which also related to a protest regarding United States policy toward El Salvador. But matters arising out of the course of judicial proceedings are not a proper basis for recusal. *United States v. Alabama*, 828 F.2d 1532, 1540 (11th Cir. 1987), *cert. denied*, 487 U.S. 1210, 108 S.Ct. 2857, 101 L.Ed.2d 894 (1988); *In re Corrugated Container Antitrust Litigation*, 614 F.2d 958 (5th Cir.), *cert. denied*, 449 U.S. 888, 101 S.Ct. 244, 661 L.Ed.2d 114 (1980);

*Honorable Jesse E. Eschbach, Senior U.S. Circuit Judge for the Seventh Circuit, sitting by designation.

Davis v. Board of School Comrs., 517 F.2d 1044 (5th Cir.1975), *cert. denied*, 425 U.S. 944, 96 S.Ct. 1685, 48 L.Ed.2d 188 (1976). Therefore, the district court properly rejected the motion. The defendants also contend that the district court denied them a fair trial. After carefully reviewing the defendants' arguments as well as the record on appeal, we have concluded that those arguments are without merit.

Conclusion

We AFFIRM the convictions.

Adm. Office, U.S. Courts—West Publishing Company, Saint Paul, Minn.

IN THE UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

NO. 91-8577

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

versus

JOHN PATRICK LITEKY
CHARLES JOSEPH LITEKY,
ROY LAWRENCE BOURGEOIS,

Defendants-Appellants.

Appeal from the United States District Court for the Middle District of Georgia

ORDER:

Appellant's motion to appeal in forma pauperis is GRANTED.

Appellant's motion for appointment of counsel is GRANTED. Attorney Peter Thompson is APPOINTED as counsel for the appellants on this appeal.

/s/ JOEL F. DUBINA
UNITED STATES CIRCUIT JUDGE

United States District Court

FILED 3:00 PM
June 25, 1991
Deputy Clerk

MIDDLE District of GEORGIA

UNITED STATES OF AMERICA
V.

JUDGMENT INCLUDING SENTENCE UNDER THE SENTENCING REFORM ACT

Case Number 91-93-COL. 03

ROY LAWRENCE BOURGEOIS

(Name of Defendant)

Peter Thompson, Minneapolis, MN
Defendant's Attorney

THE DEFENDANT:

☐ pleaded guilty to count(s) _____.
☑ was found guilty on count(s) 1 after a plea of not guilty.

Accordingly, the defendant is adjudged guilty of such count(s), which involve the following offenses:

Title & Section	Nature of Offense	Count Number(s)
18 USC 1361	damage to U.S. Government property with a value in excess of $100.00.	1

The defendant is sentenced as provided in pages 2 through 5 of this Judgment. The sentence is imposed pursuant to the Sentencing Reform Act of 1984.

☐ The defendant has been found not guilty on count(s) _____, and is discharged as to such count(s).
☑ Count(s) 2, 3 & 4 (is)(are) dismissed on the motion of the United States.
☑ The mandatory special assessment is included in the portion of this Judgment that imposes a fine.
☐ It is ordered that the defendant shall pay to the United States a special assessment of $ _____, which shall be due immediately.

It is further ordered that the defendant shall notify the United States Attorney for this district within 30 days of any change of residence or mailing address until all fines, restitution, costs, and special assessments imposed by this Judgment are fully paid.

Defendant's Soc. Sec. Number:
434-54-4376

Defendant's mailing address:
2420 Ft. Benning Road
Columbus, GA 31903

Defendant's residence address:

June 21, 1991
Date of Imposition of Sentence

Signature of Judicial Officer

J. Robert Elliott, U.S. District Judge
Name & Title of Judicial Officer

June 25, 1991
Date

Defendant: Roy Lawrence Bourgeois
Case Number: CR-91-93-COL. 03

IMPRISONMENT

The defendant is hereby committed to the custody of the United States Bureau of Prisons to be imprisoned for a term of 15 Months.

☐ The Court makes the following recommendations to the Bureau of Prisons:

☑ The defendant is remanded to the custody of the United States Marshal.
☐ The defendant shall surrender to the United States Marshal for this district,
☐ at _____ a.m. p.m. on _____.
☐ as notified by the Marshal.

☐ The defendant shall surrender for service of sentence at the institution designated by the Bureau of Prisons
☐ before 2 p.m. on _____.
☐ as notified by the United States Marshal.
☐ as notified by the Probation Office.

RETURN

I have executed this Judgment as follows:

Defendant delivered on _____ to _____ at _____, with a certified copy of this Judgment.

United States Marshal

By _____
Deputy Marshal

Defendant: Roy Lawrence Bourgeois
Case Number: CR-91-93-COL. 03

SUPERVISED RELEASE

Upon release from imprisonment, the defendant shall be on supervised release for a term of _____
2 YEARS

In addition to the standadd conditions, the folsowing conditions are imposed:

1. The defendant shall be prohibited from possessing a firearm or other dangerous weapon.

2. The defendant shall not enter or go on the grounds of any military reservation or property of any branch of the Armed Services of the U.S. Government.

While on supervised release, the defendant shall not commit another Federal, state, or local crime and shall comply with the standard conditions that have been adopted by this court (set forth on the following page). If this judgment imposes a restitution obligation, it shall be a condition of supervised release that the defendant pay any such restitution that remains unpaid at the commencement of the term of supervised release. The defendant shall comply with the following additional conditions:

☐ The defendant shall pay any fines that remain unpaid at the commencement of the term of supervised release.

Defendant: Roy Lawrence Bourgeois
Case Number: CR. 91-93-COL. 03

STANDARD CONDITIONS OF SUPERVISION

While the defendant is on probation or supervised release pursuant to this Judgment:

1) The defendant shall not commit another Federal, state or local crime;
2) the defendant shall not leave the judicial district without the permission of the court or probation officer;
3) the defendant shall report to the probation officer as directed by the court or probation officer and shall submit a truthful and complete written report within the first five days of each month;
4) the defendant shall answer truthfully all inquiries by the probation officer and follow the instructions of the probation officer;
5) the defendant shall support his or her dependents and meet other family responsibilities;
6) the defendant shall work regularly at a lawful occupation unless excused by the probation officer for schooling, training, or other acceptable reasons;
7) the defendant shall notify the probation officer within seventy-two hours of any change in residence or employment;
8) the defendant shall refrain from excessive use of alcohol and shall not purchase, possess, use, distribute, or administer any narcotic or other controlled substance, or any paraphernalia related to such substances, except as prescribed by a physician;
9) the defendant shall not frequent places where controlled substances are illegally sold, used, distributed, or administered;
10) the defendant shall not associate with any persons engaged in criminal activity, and shall not associate with any person convicted of a felony unless granted permission to do so by the probation officer;
11) the defendant shall permit a probation officer to visit him or her at any time at home or elsewhere and shall permit confiscation of any contraband observed in plain view by the probation officer;
12) the defendant shall notify the probation officer within seventy-two hours of being arrested or questioned by a law enforcement officer;
13) the defendant shall not enter into any agreement to act as an informer or a special agent of a law enforcement agency without the permission of the court;
14) as directed by the probation officer, the defendant shall notify third parties of risks that may be occasioned by the defendant's criminal record or personal history or characteristics, and shall permit the probation officer to make such notifications and to confirm the defendant's compliance with such notification requirement.

These conditions are in addition to any other conditions imposed by this Judgment.

Defendant: Roy Lawrence Bourgeois
Case Number: CR-91-93-COL. 03

FINE WITH SPECIAL ASSESSMENT

The defendant shall pay to the United States the sum of $ 50.00 , consisting of a fine of $ -0- and a special assessment of $ 50.00 .

☒ These amounts are the totals of the fines and assessments imposed on individual counts, as follows:
Count 1.

The Court has determined that defendant does not possess the financial ability to pay additional fines and waives imposition of said fines or alternative sanctions.

This sum shall be paid ☒ immediately.
☐ as follows:

☐ The Court has determined that the defendant does not have the ability to pay interest. It is ordered that:

☐ The interest requirement is waived.
☐ The interest requirement is modified as follows:

Defendant: Roy Lawrence Bourgeois
Case Number: CR-91-93-COL. 03

RESTITUTION, FORFEITURE, OR OTHER PROVISIONS OF THE JUDGMENT

The defendant shall pay restitution to the U.S. Government in the amount of $636.47 at the rate of $100.00 per month, thru the U.S. Attorney.

United States District Court

FILED 3:00 PM
June 25, 1991
Deputy Clerk

OCT 1991

MIDDLE District of GEORGIA

UNITED STATES OF AMERICA

V.

JUDGMENT INCLUDING SENTENCE UNDER THE SENTENCING REFORM ACT

Case Number 91-93-COL. 02

CHARLES JOSEPH LITEKY

(Name of Defendant) Waived
Defendant's Attorney

THE DEFENDANT:

☐ pleaded guilty to count(s) _____.
☒ was found guilty on count(s) 1 after a plea of not guilty.

Accordingly, the defendant is adjudged guilty of such count(s), which involve the following offenses:

Title & Section	Nature of Offense	Count Number(s)
18 USC 1361	damage to U.S. Government property with a value in excess of $100.00.	1

The defendant is sentenced as provided in pages 2 through 4 of this Judgment. The sentence is imposed pursuant to the Sentencing Reform Act of 1984.

☐ The defendant has been found not guilty on count(s) _____, and is discharged as to such count(s).
☒ Count(s) 2, 3 & 4 (is)(are) dismissed on the motion of the United States.
☒ The mandatory special assessment is included in the portion of this Judgment that imposes a fine.
☐ It is ordered that the defendant shall pay to the United States a special assessment of $ _____, which shall be due immediately.

It is further ordered that the defendant shall notify the United States Attorney for this district within 30 days of any change of residence or mailing address until all fines, restitution, costs, and special assessments imposed by this Judgment are fully paid.

Defendant's Soc. Sec. Number:
261-36-1808

June 21, 1991
Date of Imposition of Sentence

Defendant's mailing address:
14018 Burnt Woods Road
Glenelg, MD. 21737

Signature of Judicial Officer

J. Robert Elliott, U.S. District Judg
Name & Title of Judicial Officer

Defendant's residence address:

June 25, 1991
Date

Defendant: Charles Joseph Liteky
Case Number: CR-91-93-COL. 02

IMPRISONMENT

The defendant is hereby committed to the custody of the United States Bureau of Prisons to be imprisoned for a term of 6 months.

☐ The Court makes the following recommendations to the Bureau of Prisons:

☒ The defendant is remanded to the custody of the United States Marshal.
☐ The defendant shall surrender to the United States Marshal for this district,

☐ at _____ a.m. p.m. on _____.

☐ as notified by the Marshal.

☐ The defendant shall surrender for service of sentence at the institution designated by the Bureau of Prisons

☐ before 2 p.m. on _____.
☐ as notified by the United States Marshal.
☐ as notified by the Probation Office.

RETURN

I have executed this Judgment as follows:

_____

_____

_____

_____

Defendant delivered on _____ to _____ at _____, with a certified copy of this Judgment.

_____
United States Marshal

By _____

Defendant: Charles Joseph Liteky
Case Number: CR-91-93-COL. 02

FINE WITH SPECIAL ASSESSMENT

The defendant shall pay to the United States the sum of $ 50.00, consisting of a fine of $ -0- and a special assessment of $ 50.00.

☒ These amounts are the totals of the fines and assessments imposed on individual counts, as follows:

Count 1.

The Court has determined that defendant does not possess the financial ability to pay additional fines and waives imposition of said fines or alternative sanctions.

This sum shall be paid ☒ immediately.
☐ as follows:

☐ The Court has determined that the defendant does not have the ability to pay interest. It is ordered that:

☐ The interest requirement is waived.
☐ The interest requirement is modified as follows:

Defendant: Charles Joseph Liteky
Case Number: CR-91-93-COL. 02

RESTITUTION, FORFEITURE, OR OTHER PROVISIONS OF THE JUDGMENT

The defendant shall pay restitution to the United States Government in the amount of $636.47, within 6 months, thru the U.S. Attorney.

United States District Court

DEC 01 1991

FILED 3:00 PM
June 25, 1991
Deputy Clerk

MIDDLE District of GEORGIA

UNITED STATES OF AMERICA

V.

JUDGMENT INCLUDING SENTENCE UNDER THE SENTENCING REFORM ACT

JOHN PATRICK LITEKY

FILED
U.S. COURT OF APPEALS
ELEVENTH CIRCUIT
JUL - 1 1991
MIGUEL J. CORTEZ
CLERK

Case Number 91-93-COL. 01

(Name of Defendant)

Waived
Defendant's Attorney

THE DEFENDANT:

☐ pleaded guilty to count(s) _____.
☒ was found guilty on count(s) 1 after a plea of not guilty.

Accordingly, the defendant is adjudged guilty of such count(s), which involve the following offenses:

Title & Section	Nature of Offense	Count Number(s)
18 USC 1361	damage to U.S. Government property with a value in excess of $100.00	1

The defendant is sentenced as provided in pages 2 through 4 of this Judgment. The sentence is imposed pursuant to the Sentencing Reform Act of 1984.

☐ The defendant has been found not guilty on count(s) _____, and is discharged as to such count(s).
☒ Count(s) 2, 3 & 4 (is)(are) dismissed on the motion of the United States.
☒ The mandatory special assessment is included in the portion of this Judgment that imposes a fine.
☐ It is ordered that the defendant shall pay to the United States a special assessment of $ _____, which shall be due immediately.

It is further ordered that the defendant shall notify the United States Attorney for this district within 30 days of any change of residence or mailing address until all fines, restitution, costs, and special assessments imposed by this Judgment are fully paid.

Defendant's Soc. Sec. Number:
267-50-7406

Defendant's mailing address:
1933 Park Avenue
Baltimore, MD 21217

Defendant's residence address:

June 21, 1991
Date of Imposition of Sentence

Signature of Judicial Officer

J. Robert Elliott, U.S. District Judge
Name & Title of Judicial Officer

June 25, 1991
Date

A true and certified copy.
This 6-28-1991
GREGORY J. LEONARD, CLERK
U.S. Dist. Court, MD Ga.
By: DEPUTY CLERK

IMPRISONMENT

The defendant is hereby committed to the custody of the United States Bureau of Prisons to be imprisoned for a term of 6 Months.

☐ The Court makes the following recommendations to the Bureau of Prisons:

☐ The defendant is remanded to the custody of the United States Marshal.
☐ The defendant shall surrender to the United States Marshal for this district,
☐ at _____ a.m. / p.m. on _____.
☐ as notified by the Marshal.

☒ The defendant shall surrender for service of sentence at the institution designated by the Bureau of Prisons
☐ before 2 p.m. on _____.
☐ as notified by the United States Marshal.
☒ as notified by the Probation Office.

RETURN

I have executed this Judgment as follows:

Defendant delivered on _____ to _____ at _____, with a certified copy of this Judgment.

United States Marshal

By _____
Deputy Marshal

Defendant: John Patrick Liteky
Case Number: CR-91-93-COL. 01

FINE WITH SPECIAL ASSESSMENT

The defendant shall pay to the United States the sum of $ 50.00, consisting of a fine of $ -0- and a special assessment of $ 50.00.

☒ These amounts are the totals of the fines and assessments imposed on individual counts, as follows:

Count 1.

The Court has determined that defendant does not possess the financial ability to pay additional fines and waives imposition of said fines or alternative sanctions.

This sum shall be paid ☒ immediately.
☐ as follows:

☐ The Court has determined that the defendant does not have the ability to pay interest. It is ordered that:

☐ The interest requirement is waived.
☐ The interest requirement is modified as follows:

Defendant: John Patrick Liteky
Case Number: CR-91-93-COL. . 01

RESTITUTION, FORFEITURE, OR OTHER PROVISIONS OF THE JUDGMENT

The defendant shall pay restitution to the United States Government in the amount of $636.47, within 6 Months, thru the U.S. Attorney.

IN THE UNITED STATES DISTRICT COURT FOR THE
MIDDLE DISTRICT OF GEORGIA
COLUMBUS DIVISION

UNITED STATES OF AMERICA :
:
vs. : CRIMINAL NO: 91-93-COL(JRE)
:
JOHN PATRICK LITEKY, :
CHARLES JOSEPH LITEKY, :
and ROY BOURGEOIS :
:

Filed at 12:45P M
FEB 25 1991
DEPUTY CLERK U.S. DISTRICT COURT
MIDDLE DISTRICT OF GEORGIA

ORDER ON DEFENDANTS' MOTION TO RECUSE

The Court has carefully reviewed the motion of the defendants in the above captioned matter requesting recusal of this Court in the trial of said matter.

The Court finds that the motion for recusal and the documents in support thereof are insufficient on their face to warrant granting the relief sought. Said motion is insufficient in the following particulars, to-wit:

The main thrust of the motion alleges bias on the part of this Court primarily against Defendant Bourgeois as a result of a bench trial of that defendant before this court in 1983 in Criminal No: 83-316-COL. All allegations of bias resulting from that trial arise out of matters occurring during the course of that case. Matters arising out of the course of judicial proceedings are not a proper basis for recusal under either Title 18 United States Code Section 144 or Title 18 United States Code Section 455. In re Corrugated Container Antitrust Litigation, 614 F.2d 958 (5th Cir. 1980), cert. denied, 101 S.Ct. 244; Davis v. Board of School Commissioners, 517 F.2d 1044 (5th Cir. 1975),

cert. denied 425 U.S. 944.

All other factual allegations contained in the motion to recuse and its supporting documents are conclusory in nature, do not state any particulars in which this Court is supposed to be biased either against the defendants or toward the government, and pertain only to the general background and associations of the Court. Additionally, such facts are not of such nature that an objective, disinterested lay observer would entertain a significant doubt about this Court's impartiality based thereon. United States v. Alabama, 828 F.2d 1532 (11th Cir. 1987), cert. denied, 108 S.Ct. 2857.

The defendants' motion for recusal being insufficient under the requirement both Title 18 United States Code Section 144 and Title 18 United States Code 455, same is denied.

SO ORDERED this 25 day of February, 1991.

J. ROBERT ELLIOTT
UNITED STATES DISTRICT JUDGE

UNITED STATES SUPREME COURT

ROY LAWRENCE BOURGEOIS,)
CHARLES JOSEPH LITEKY, and)
JOHN PATRICK LITEKY,)
)
Petitioners,)
)
vs.)
)
UNITED STATES OF AMERICA,)
)
Respondent.)

ORIGINAL

MOTION FOR LEAVE TO PROCEED IN FORMA PAUPERIS

No. 92-6921

Petitioners, pursuant to Sup.Ct.R. 39(.1), hereby move the Court for leave to proceed in forma pauperis on the grounds that such leave had been previously granted by the Court of Appeals for the Eleventh Circuit, and since that time, Petitioners' financial status has not changed. The Eleventh Circuit ruling reversed the trial Court's determination that there "is not probable cause for appeal". Counsel was appointed under the Criminal Justice Act by the Eleventh Circuit Court of Appeals. Petitioners will be unable to continue with the Petition or appeal process if required to pay the costs.

Dated: December 10, 1992

Respectfully submitted,

THOMPSON, LUNDQUIST & SICOLI, LTD.

By: Peter Thompson
Peter Thompson, 109344
2520 Park Avenue South
Minneapolis, Minnesota 55404
(612) 871-0708

Attorneys for Petitioners

ORIGINAL

No. 92-6921

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1992

JOHN PATRICK LITEKY, CHARLES JOSEPH LITEKY, AND ROY LAWRENCE BOURGEOIS, PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

WILLIAM C. BRYSON
Acting Solicitor General

JOHN C. KEENEY
Acting Assistant Attorney General

JOEL M. GERSHOWITZ
Attorney

Department of Justice
Washington, D.C. 20530
(202) 514-2217

QUESTION PRESENTED

Whether the district judge abused his discretion by refusing to recuse himself under 28 U.S.C. 455(a), which requires recusal when a judge's impartiality might reasonably be questioned.

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1992

No. 92-6921

JOHN PATRICK LITEKY, CHARLES JOSEPH LITEKY, AND ROY LAWRENCE BOURGEOIS, PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals (Pet. App A2-A3) is reported at 973 F.2d 910.

JURISDICTION

The judgment of the court of appeals was entered on September 28, 1992. The petition for a writ of certiorari was filed on December 14, 1992. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

After a jury trial in the United States District Court for the Middle District of Georgia, petitioners were convicted of willfully injuring property of the United States, in violation of

18 U.S.C. 1361. Petitioner Bourgeois was sentenced to 16 months' imprisonment, to be followed by a two-year period of supervised release. Petitioners Charles and John Liteky were sentenced to six months' imprisonment. In addition, each petitioner was ordered to make restitution to the United States in the amount of $636.47. The court of appeals affirmed. Pet. App. A2-A3.

1. The evidence at trial showed that, on November 16, 1990, petitioners spilled human blood on the interior and exterior walls of a building located on the Fort Benning Military Reservation. Petitioners left leaflets bearing their signatures at the site. At trial, petitioners did not deny their commission of the offense. Pet. App. A2; Gov't C.A. Br. 5-6.

2. Prior to trial, petitioners moved to recuse the district judge pursuant to 28 U.S.C. 455(a), which requires the disqualification of a judge "in any proceeding in which his impartiality might reasonably be questioned." The motion was premised in large part on the fact that, in 1983, the same district judge had presided over a bench trial that resulted in the conviction of petitioner Bourgeois for offenses arising out of an earlier protest at Fort Benning. Pet. C.A. Br. 4. According to petitioners, the transcript of the 1983 case showed that the judge "sternly lectured and criticized [Bourgeois], interrupted defense cross-examination, refused to hear Father Bourgeois' background, and interrupted and argued with Father Bougeois without prosecution objection." Id. at 5 (citations omitted).

The district court denied the motion, holding that a

defendant may not obtain a judge's recusal based on allegations of bias arising out of the course of judicial proceedings. Pet. App. A19. Petitioners orally renewed the motion to recuse during the course of the trial, and the district court again denied the motion. Pet. 2; Gov't C.A. Br. 6.

3. On appeal, petitioners renewed their recusal claim. Like the district court, the court of appeals held that "matters arising out of the course of judicial proceedings are not a proper basis for recusal." Pet. App. A2. Accordingly, the court of appeals concluded that the district court properly denied petitioners' motion to recuse. Id. at A3.

ARGUMENT

Petitioners contend that the district judge should have recused himself under 28 U.S.C. 455(a) because of allegedly "intemperate remarks" (Pet. 2) he made at the earlier trial of petitioner Bourgeois. They rely principally on United States v. Chantal, 902 F.2d 1018 (1st Cir. 1990), which held that a judge's acquisition of information in a prior case can be grounds for recusal under Section 455(a) if the judge's statements or actions would lead a reasonable person to question his impartiality. 902 F.2d at 1022-1024. Although Chantal differs in approach from the opinion in this case,[1] we doubt that the First Circuit would

---

[1] Like the Eleventh Circuit in this case, most courts of appeals that have addressed the issue have held that a motion for recusal under Section 455(a) must be based on circumstances that are extrajudicial in origin. See, e.g., United States v. Barry, 961 F.2d 260, 263 (D.C. Cir. 1992); United States v. Sammons, 918 F.2d 592, 599 (6th Cir. 1990); McWhorter v. City of Birmingham, 906 F.2d 674, 678 (11th Cir. 1990); United States v. Mitchell,

have reached a different result on the facts of this case than did the courts below.[2]

In Chantal, the district judge had stated during the sentencing phase of a previous prosecution that he believed that Chantal was "an 'unreconstructed drug trafficker,'" and that the judge had "no confidence whatever that [Chantal] will change his ways in the future." 902 F.2d at 1020. When Chantal was again

---

886 F.2d 667, 671 (4th Cir. 1989); United States v. Merkt, 794 F.2d 950, 960 (5th Cir. 1986), cert. denied, 480 U.S. 946 (1987); United States v. Sibla, 624 F.2d 864, 869 (9th Cir. 1980). Although some courts have recognized an exception to that general rule when the moving party demonstrates pervasive bias and prejudice (see, e.g., McWhorter v. City of Birmingham, 906 F.2d at 678), petitioners do not allege, and there is no basis for finding, such circumstances in this case.

[2] The other court of appeals decisions on which petitioners rely (Pet. 3-11) are inapposite. Haines v. Liggett Group Inc., 975 F.2d 81 (3d Cir. 1992), and Nicodemus v. Chrysler Corp., 596 F.2d 152 (6th Cir. 1979), each involved an appellate court's exercise of its supervisory power to reassign a case on remand because of the district judge's conduct during his participation in that case, rather than a recusal motion under Section 455(a) seeking disqualification of a judge because of his conduct in previous litigation. Roberts v. Bailar, 625 F.2d 125 (6th Cir. 1980), does not address the question whether recusal is required where the appearance of bias arises from information obtained in the course of judicial proceedings; the appearance of bias that led to recusal in that employment discrimination case was the district judge's comment that "'I know [the responsible official of the defendant employer], and he is an honorable man and I know he would never intentionally discriminate against anybody.'" 625 F.2d at 127. Moreover, the Sixth Circuit has made clear since its decisions in Roberts and Nicodemus that a motion for recusal under Section 455(a) must be based on extrajudicial circumstances. See Sammons, 918 F.2d at 599. Finally, in United States v. Coven, 662 F.2d 162 (2d Cir. 1981), cert. denied, 456 U.S. 916 (1982), the court declined to grant a recusal motion under Section 455(a) based on the judge's knowledge of allegedly prejudicial information acquired in a prior proceeding, and stated that the fact that the judge came upon the information in her judicial rather than her personal capacity, "even if not dispositive, is relevant to an analysis of the appearance of impartiality." 662 F.2d at 168.

indicted and the case was assigned to the same district judge, Chantal moved to recuse him under Section 455(a), citing the judge's remarks in the previous case. The district judge denied the motion, reasoning that his prior comments arose from a judicial rather than extrajudicial source. Concluding that an appearance of bias could in some circumstances arise out of judicial proceedings, the First Circuit reversed and remanded for consideration of whether the trial judge's impartiality could reasonably have been questioned. 902 F.2d at 1024.

In this case, by contrast, petitioners do not raise a substantial claim that the district judge's impartiality could reasonably be questioned based on his conduct in the prior proceeding. Indeed, in this Court petitioners do not even specify the remarks of the district judge that they believe created an appearance of bias. Although petitioners were more specific in the court of appeals (see Pet. C.A. Br. 17-19), none of the judge's remarks cited by petitioners below was inappropriate or even faintly suggestive of bias on the part of the judge.

The alleged evidence of bias relied on by petitioners in the court of appeals consisted primarily of statements by the district judge relating to the attempt by Bourgeois and his co-defendants at the 1983 proceeding to turn their bench trial into a forum for the expression of their political views. Thus, petitioners found fault with the judge's indication at the outset of the 1983 trial that "[t]his is a judicial forum. This is not a political forum. We are here for the purpose of trying this

criminal case. I just want to be sure that we all understand that." 9/14/83 Tr. 10; see Pet. C.A. Br. 17.

Similarly, petitioners criticize other attempts by the district judge to clarify testimony, assist the orderly progress of the trial, and restrain Bourgeois from testifying about irrelevant matters such as his opinion of the situation in El Salvador. Id. at 17-18; see, e.g., 9/14/83 Tr. 15, 100, 109-110, 146-147, 152-153, 159. In fact, however, those comments by the district judge reflected an appropriate and restrained reaction to Bourgeois's attempts to turn the trial into a political debate, and they provide no basis for questioning the judge's impartiality. Accordingly, even under the reasoning of Chantel, the courts below acted properly in rejecting petitioners' recusal claim.

This Court recently denied a petition for a writ of certiorari that raised precisely the same question that is at issue in this case. See Waller v. United States, No. 91-1410, cert. denied, 112 S. Ct. 2321 (1992). Petitioners point to nothing that would justify a different outcome in this case. Because petitioners' motion to recuse was properly denied under any construction of Section 455(a), further review is not warranted.[3]

---

[3] Petitioners John and Charles Liteky were not defendants in the earlier 1983 trial. They do not explain how the district judge's alleged bias against petitioner Bourgeois as a result of that 1983 trial provided any basis for seeking to recuse the judge from trying the case against them. Thus, as to those petitioners in particular, there is no possibility that the district court erred in denying the recusal motion.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

WILLIAM C. BRYSON
Acting Solicitor General

JOHN C. KEENEY
Acting Assistant Attorney General

JOEL M. GERSHOWITZ
Attorney

MARCH 1993

No. 92-6921

IN THE SUPREME COURT OF THE
UNITED STATES

October Term, 1992

ROY LAWRENCE BOURGEOIS,
CHARLES JOSEPH LITEKY, and
JOHN PATRICK LITEKY,

Petitioners.

vs.

UNITED STATES OF AMERICA,

Respondent

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

REPLY TO BRIEF IN OPPOSITION

By: Peter Thompson, 190344
THOMPSON, LUNDQUIST &
SICOLI, LTD.
2520 Park Avenue South
Minneapolis, Minnesota 55404
(612) 871-0708

Attorneys for Petitioners

REPLY ARGUMENT

The United States has mischaracterized the issue in this case as whether the district judge abused his discretion by refusing to recuse himself under 28 U.S.C. §455(a). The issue is not such a mixed matter of fact and law. The trial judge's impartiality demonstrated both in the 1983 bench trial and the 1991 jury trial were not submitted as a reason for granting the Petition For A Writ Of Certiorari. Rather, only the pure legal question of the proper standard to be applied in a recusal motion under 28 U.S.C. §455(a) is presented.

The United States argues that the facts of United States v. Chantal, 902 F.2d 1018 (1st Cir. 1990), are more egregious than the facts herein and opines that the First Circuit may not have recused in the instant case. (Brief for United States, pp. 3-4). While the United States' argument misrepresents the facts, ultimately, such mischaracterization is irrelevant to whether the court failed to apply the correct legal standard.

United States v. Chantal, supra, the legislative history of 28 U.S.C. §455(a), legal commentators, and other Circuit decisions cited in the Petition For A Writ Of Certiorari (pp. 8-11), establish that bias may arise from either a judicial or extra-judicial source. The trial judge here refused to consider the bias of judicial source; the government now cannot be heard to argue that had the trial court or Eleventh Circuit used the proper standard, they may have denied the recusal motion anyhow.

Judicial impartiality is essential for a fair and effective judicial system. United States v. Alabama, 828 F.2d 1532, 1539 (11th Cir. 1987). An abuse of discretion standard on facts not considered by the trial court has no application to this petition. Only if the federal trial courts uniformly apply the proper standard for recusal will this essential be vindicated.

Finally, the United States questions how codefendants John and Charles Liteky could join in the recusal motion against the trial judge inasmuch as they were not defendants in the 1983 trial. First, the Litekys were charged and tried jointly with Father Bourgeois before the same jury. Second, in the 1983 transcript, which should not have been ignored in passing on the recusal motion, it was obvious the trial judge was impatient with Father Bourgeois and his co-defendants, disregarded the defense of all defendants, and showed animosity toward Father Bourgeois as well as his two similarly situated codefendants. Therefore, the Litekys' joint recusal motion with Father Bourgeois appropriately anticipated the trial judge's interjections and harsh criticism of codefendants jointly engaged in the alleged criminal protest.

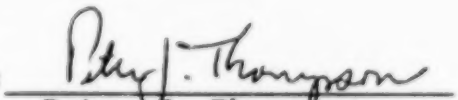
CONCLUSION

The failure of the United States to address the legal issue underscores the irreconcilable split in the Circuit Courts of Appeal requiring an extra-judicial source requirement for recusal under 18 U.S.C. §455(a). The Eleventh Circuit is not only at odds with other courts of appeal, but also with the statutory language, the legislative history, and the analysis of legal commentators. We request the Court grant the Petition For A Writ Of Certiorari.

Dated: March 26, 1993

Respectfully submitted,

THOMPSON, LUNDQUIST & SICOLI, LTD.

By: 

Peter J. Thompson
Attorney for Petitioners
2520 Park Avenue South
Minneapolis, Minnesota 55404
Telephone: (612) 871-0708
Reg. No. 109344

No. 92-6921

In The

Supreme Court of the United States

October Term, 1993

JOHN PATRICK LITEKY, CHARLES JOSEPH LITEKY, AND ROY LAWRENCE BOURGEOIS,

Petitioners,

v.

UNITED STATES,

Respondent.

On Writ Of Certiorari To The United States Court Of Appeals For The Eleventh Circuit

JOINT APPENDIX

PETER THOMPSON
THOMPSON, LUNDQUIST & SICOLI, LTD.
2520 Park Avenue South
Minneapolis, Minnesota 55404
(612) 871-0708

Counsel for Petitioners

DREW S. DAYS, III
Solicitor General
Department of Justice
Washington, D.C. 20530
(202) 514-2255

Counsel for Respondent

Petition For Certiorari Filed December 14, 1992
Certiorari Granted May 24, 1993

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

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March 25-26, 1991	Jury Trial.
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IN THE UNITED STATES DISTRICT COURT FOR THE
MIDDLE DISTRICT OF GEORGIA
COLUMBUS DIVISION

UNITED STATES OF AMERICA	:	CRIMINAL NO: 91-93-COL-JRE
vs.	:	Violations:
JOHN PATRICK LITEKY, CHARLES JOSEPH LITEKY, and ROY LAWRENCE BOURGEOIS	:	18 U.S.C. § 1361 18 U.S.C. § 1382

THE GRAND JURY CHARGES:

COUNT ONE

On or about the 16th day of November, 1990, in the Middle District of Georgia the defendants, to-wit:

JOHN PATRICK LITEKY,
CHARLES JOSEPH LITEKY,
and ROY LAWRENCE BOURGEOIS,

wilfully and be [sic] means of slinging, pouring, throwing and depositing a staining, defacing and discoloring liquid and mixture did injury [sic] property of the United States, that is, interior and exterior walls, floors and carpet, photographs, pictures, photographic and picture mattes, photograph and picture frames, flags, ceilings, doors, and display cases and display case mattes at building number 468, the Headquarters of the School of Americus, Fort Benning Military Reservation, Georgia, thereby causing damage to such property in excess of $100.00, in violation of 18 United States Code Section 1361.

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF GEORGIA
COLUMBUS DIVISION

UNITED STATES OF AMERICA, Plaintiff, v. ROY LAWRENCE BOURGEOIS, Defendant.	)	MOTION TO RECUSE Cr. No. 91-93-COL-JRE

Defendant, *pro se*, hereby moves the Court for an Order disqualifying the Honorable J. Robert Elliott, United States District Judge for the District of Georgia, on the grounds that he has a personal bias or prejudice against the defendant and/or in favor of the plaintiff pursuant to Title 28, United States Code §§455 and 144.

This Motion is based upon the Indictment, all the records and files in the above-entitled action, all the records and files in Docket No. 83-316-COL, including the transcript of trial and sentencing of that matter on September 14, 1983, the Affidavit of defendant, the attached Memorandum of Law and any and all other matters which may be presented prior to or at the time of hearing of said Motion.

Dated:

By: _____
Roy L. Bourgeois, *pro se*
2420 Fort Benning Road
Apartment 1
Columbus, Georgia 31903
Telephone: (404) 682-5369

IN THE UNITED STATES DISTRICT COURT FOR THE
MIDDLE DISTRICT OF GEORGIA
COLUMBUS DIVISION

UNITED STATES OF AMERICA	:	CRIMINAL NO: 91-93-COL (JRE)
vs.	:	
JOHN PATRICK LITEKY, CHARLES JOSEPH LITEKY, and ROY BOURGEOIS	:	

ORDER ON DEFENDANTS' MOTION TO RECUSE

The Court has carefully reviewed the motion of the defendants in the above captioned matter requesting recusal of this Court in the trial of said matter.

The Court finds that the motion for recusal and the documents in support thereof are insufficient on their face to warrant granting the relief sought. Said motion is insufficient in the following particulars, to-wit:

The main thrust of the motion alleges bias on the part of this Court primarily against Defendant Bourgeois as a result of a bench trial of that defendant before this court in 1983 in Criminal No: 83-316-COL. All allegations of bias resulting from that trial arise out of matters occurring during the course of that case. Matters arising out of the course of judicial proceedings are not a proper basis for recusal under either Title 18 United States Code Section 144 or Title 18 United States Code Section 455. *In re Corrugated Container Antitrust Litigation*, 614 F.2d 958 (5th Cir. 1980), *cert. denied*, 101 S.Ct. 244; *Davis v. Board of*

School Commissioners, 517 F.2d 1044 (5th Cir. 1975),*cert. denied* 425 U.S. 944.

All other factual allegations contained in the motion to recuse and its supporting documents are conclusory in nature, do not state any particulars in which this Court is supposed to be biased either against the defendants or toward the government, and pertain only to the general background and associations of the Court. Additionally, such facts are not of such nature that an objective, disinterested lay observer would entertain a significant doubt about this Court's impartiality based thereon. *United States v. Alabama*, 828 F.2d 1532 (11th Cir. 1987), *cert. denied*, 108 S.Ct. 2857.

The defendants' motion for recusal being insufficient under the requirement both Title 18 United States Code Section 144 and Title 18 United States Code 455, same is denied.

SO ORDERED this 25 day of February, 1991.

/s/ J. Robert Elliott
J. ROBERT ELLIOTT
UNITED STATES DISTRICT JUDGE

UNITED STATES DISTRICT COURT

MIDDLE District of GEORGIA

UNITED STATES OF AMERICA

v.

ROY LAWRENCE BOURGEOIS

(NAME OF DEFENDANT)

JUDGMENT INCLUDING SENTENCE UNDER THE SENTENCING REFORM ACT

Case Number 91-93-COL. 03

Peter Thompson, Minneapolis, MN
Defendant's Attorney

THE DEFENDANT:

[ ] pleaded guilty to count(s)_____.

[X] was found guilty on count(s) 1 after a plea of not guilty.

Accordingly, the defendant is adjudged guilty of such count(s), which involve the following offenses:

Title & Section

18 USC 1361

Nature of Offense

damage to U.S. Government property with a value in excess of $100.00.

Count Number(s)

1

The defendant is sentenced as provided in pages 2 through 5 of this Judgment. The sentence is imposed pursuant to the Sentencing Reform Act of 1984.

[ ] The defendant has been found not guilty on count(s) _____ and is discharged as to such count(s)

[X] Count(s) 2, 3 & 4 ~~(is)~~ (are) dismissed on the motion of the United States.

[X] The mandatory special assessment is included in the portion of this Judgment that imposes a fine.

[ ] It is ordered that the defendant shall pay to the United States a special assessment of $___, which shall be due immediately.

It is further ordered that the defendant shall notify the United States Attorney for this district within 30 days of any change of residence or mailing address until all fines, restitution, costs, and special assessments imposed by this Judgment are fully paid.

Defendant's Soc. Sec. Number:
434-54-4376

Defendant's mailing address:
2420 Ft. Benning Road
Columbus, GA 31903

Defendant's residence address:

_____

_____

June 21, 1991
Date of Imposition of Sentence

/s/ (illegible)
Signature of Judicial Officer

J. Robert Elliott, U.S. District Judge
Name & Title of Judicial Officer

June 25, 1991
Date

IMPRISONMENT

The defendant is hereby committed to the custody of the United States Bureau of Prisons to be imprisoned for a term of 16 Months

[ ] The Court makes the following recommendations to the Bureau of Prisons:

[X] The defendant is remanded to the custody of the United States Marshal.

[ ] The defendant shall surrender to the United States Marshal for this district,

a.m.

[ ] at ___p.m. on ___.

[ ] as notified by the Marshal.

[ ] The defendant shall surrender for service of sentence at the institution designated by the Bureau of Prisons

[ ] before 2 p.m. on ___.

[ ] as notified by the United States Marshal.
[ ] as notified by the United States Marshal.

RETURN

I have executed this Judgment as follows:

_____

_____

_____

_____

Defendant delivered on _____ to _____
at _____, with a certified copy of this Judgment.

_____
United States Marshal

By _____
Deputy Marshal

SUPERVISED RELEASE

Upon release from imprisonment, the defendant shall be on supervised release for a term of 2 YEARS. In addition to the standard conditions, the following conditions are imposed:

1. The defendant shall be prohibited from possessing a firearm or other dangerous weapon.
2. The defendant shall not enter or go on the grounds of any military reservation or property of any branch of the Armed Services of the U.S. Government.

When on supervised release, the defendant shall not commit another Federal, state, or local crime and shall comply with the standard conditions that have been adopted by this court (set forth on the following page). If this judgment imposes a restitution obligation, it shall be a condition of

supervised release that the defendant pay any such restitution that remains unpaid at the commencement of the term of supervised release. The defendant shall comply with the following additional conditions:

[ ] The defendant shall pay any fines that remain unpaid at the commencement of the term of supervised release.

STANDARD CONDITIONS OF SUPERVISION

While the defendant is on probation or supervised release pursuant to this Judgment:

1) The defendant shall not commit another Federal, state or local crime;

2) the defendant shall not leave the judicial district without the permission of the court or probation officer;

3) the defendant shall report to the probation officer as directed by the court or probation officer and shall submit a truthful and complete written report within the first five days of each month;

4) the defendant shall answer truthfully all inquiries by the probation officer and follow the instructions of the probation officer;

5) the defendant shall support his or her dependents and meet other family responsibilities;

6) the defendant shall work regularly at a lawful occupation unless excused by the probation officer for schooling, training, or other acceptable reasons;

7) the defendant shall notify the probation officer within seventy-two hours of any change in residence or employment;

8) the defendant shall refrain from excessive use of alcohol and shall not purchase, possess, use, distribute, or administer any narcotic or other controlled substance, or any paraphernalia related to such substances, except as prescribed by a physician;

9) the defendant shall not frequent places where controlled substances are illegally sold, used, distributed, or administered;

10) the defendant shall not associate with any persons engaged in criminal activity, and shall not associate with any person convicted of a felony unless granted permission to do so by the probation officer;

11) the defendant shall permit a probation officer to visit him or her at any time at home or elsewhere and shall permit confiscation of any contraband observed in plain view by the probation officer;

12) the defendant shall notify the probation officer within seventy-two hours of being arrested or questioned by a law enforcement officer;

13) the defendant shall not enter into any agreement to act as an informer or a special agent of a law enforcement agency without the permission of the court;

14) as directed by the probation officer, the defendant shall notify third parties of risks that may be occasioned by the defendant's criminal record or personal history or characteristics, and shall permit the probation officer to make such notifications and to confirm the defendant's compliance with such notification requirement.

These conditions are in addition to any other conditions imposed by this Judgment.

FINE WITH SPECIAL ASSESSMENT

The defendant shall pay to the United States the sum of $50.00, consisting of a fine of $-0- and a special assessment of $50.00.

[X] These amounts are the totals of the fines and assessments imposed on individual counts, as follows:

Count 1.

The Court has determined that defendant does not possess the financial ability to pay additional fines and waives imposition of said fines or alternative sanctions.

This sum shall be paid [X] immediately.
[ ] as follows:

[ ] The Court has determined that the defendant does not have the ability to pay interest. It is ordered that:

[ ] The interest requirement is waived.

[ ] The interest requirement is modified as follows:

RESTITUTION, FORFEITURE, OR
OTHER PROVISIONS OF THE JUDGMENT

The defendant shall pay restitution to the U.S. Government in the amount of $636.47 at the rate of $100.00 per month, thru the U.S. Attorney.

United States District Court

Middle District of GEORGIA

UNITED STATES OF AMERICA

V.

JOHN PATRICK LITEKY

(Name of Defendant)

JUDGMENT INCLUDING SENTENCE UNDER THE SENTENCING REFORM ACT

Case Number
91-93-COL. 01
Waived
Defendant's Attorney

THE DEFENDANT:

[ ] Pleaded guilty to count(s)_____

[X] was found guilty on count~~(s)~~ 1 after a plea of not guilty.

Accordingly, the defendant is adjudged guilty of such count(s), which involve the following offenses:

Title & Section

18 USC 1361

Nature of Offense

Damage to U.S. Government property with a value in excess of $100.00

Count Number~~(s)~~

1

The defendant is sentenced as provided in pages 2 through 4 of this judgment. The sentence is imposed pursuant to the Sentencing Reform Act of 1984.

[ ] The Defendant has been found not guilty on count(s)_____, and is discharged as to such count(s).

[X] Count(s) 2,3 & 4 ~~(is)~~ (are) dismissed on the motion of the United States.

[X] The mandatory special assessment is included in the portion of this judgment that imposes a fine.

[ ] It is ordered that the defendant shall pay to the United States a special asessment of $_____, which shall be due immediately.

It is further ordered that the defendant shall notify the United States Attorney for this district within 30 days of any change of residence or mailing address until all fines, restitution, costs, and special assessments imposed by this judgment are fully paid.

Defendant's Soc. Sec. Number:
267-50-7406

Defendant's mailing address:
1933 Park Avenue

Baltimore, MD 21217

Defendant's Residence address:

_____

_____

June 21, 1991
Date of Imposition of Sentence

J. Robert Elliott
Signature of Judicial Officer

J. Robert Elliott, U.S. District Judge
Name & Title of Judicial Officer

June 25, 1991
Date

IMPRISONMENT

The defendant is hereby committed to the custody of the United States Bureau of Prisons to be imprisoned for a term of 6 months.

[ ] The Court makes the following recommendations to the Bureau of Prisons:

[ ] The defendant is remanded to the custody of the United States Marshal.

[ ] The defendant shall surrender to the United States Marshal for this district.

[ ] at___a.m. p.m. on _____.

[ ] as notified by the Marshal.

[X] The Defendant shall surrender for service of sentence at the institution designated by the Bureau of Prisons

[ ] before 2 p.m. on _____.

[ ] as notified by the United States Marshal.

[X] as notified by the Probation Office.

RETURN

I have executed this Judgment as follows:

_____

_____

_____

_____

Defendant delivered on _____ to _____ at _____, with a certified copy of this judgment.

_____
United States Marshal

By _____
Deputy Marshal

FINE WITH SPECIAL ASSESSMENT

The defendant shall pay to the United States the sum of $50.00, consisting of a fine of $-0- and a special assessment of $50.00.

[X] These amounts are the totals of the fines and assessments imposed on individual counts, as follows:

Count 1.

The Court has determined that defendant does not possess the financial ability to pay additional fines and waives imposition of said fines or alternative sanctions.

This sum shall be paid [X] immediately.
[ ] as follows:

[ ] The Court has determined that the defendant does not have the ability to pay interest. It is ordered that:

[ ] The interest requirement is waived.

[ ] The interest requirement is modified as follows:

RESTITUTION, FORFEITURE, OR OTHER PROVISIONS OF THE JUDGMENT

The defendant shall pay restitution to the United States Government in the amount of $636.47, within 6 months, thru the U.S. Attorney.

_____

United States District Court

Middle District of GEORGIA

UNITED STATES OF AMERICA

V.

CHARLES JOSEPH LITEKY

(Name of Defendant)

JUDGMENT INCLUDING SENTENCE UNDER THE SENTENCING REFORM ACT

Case Number
91-93-COL. 02
Waived
Defendant's Attorney

THE DEFENDANT:

[ ] Pleaded guilty to count(s)_____

[X] was found guilty on count~~(s)~~ 1 after a plea of not guilty.

Accordingly, the defendant is adjudged guilty of such count(s), which involve the following offenses:

Title & Section

18 USC 1361

Nature of Offense

Damage to U.S. Government property with a value in excess of $100.00

Count Number~~(s)~~

1

The defendant is sentenced as provided in pages 2 through 4 of this judgment. The sentence is imposed pursuant to the Sentencing Reform Act of 1984.

[ ] The Defendant has been found not guilty on count(s)_____, and is discharged as to such count(s).

[X] Count(s) 2,3 & 4 ~~(is)~~ (are) dismissed on the motion of the United States.

[X] The mandatory special assessment is included in the portion of this judgment that imposes a fine.

[ ] It is ordered that the defendant shall pay to the United States a special assessment of $_____, which shall be due immediately.

It is further ordered that the defendant shall notify the United States Attorney for this district within 30 days of any change of residence or mailing address until all fines, restitution, costs, and special assessments imposed by this judgment are fully paid.

Defendant's Soc. Sec. Number:

261-36-1808

Defendant's mailing address:
14018 Burnt Woods Road

Glenelg, MD 21737

Defendant's Residence address:

_____

_____

June 21, 1991
Date of Imposition of Sentence

/s/ J. Robert Elliott
Signature of Judicial Officer

J. Robert Elliott, U.S. District Judge
Name & Title of Judicial Officer

June 25, 1991
Date

IMPRISONMENT

The defendant is hereby committed to the custody of the United States Bureau of Prisons to be imprisoned for a term of 6 months.

[ ] The Court makes the following recommendations to the Bureau of Prisons:

[X] The defendant is remanded to the custody of the United States Marshal.

[ ] The defendant shall surrender to the United States Marshal for this district.

[ ] at__a.m. p.m. on _____.

[ ] as notified by the Marshal.

[X] The Defendant shall surrender for service of sentence at the institution designated by the Bureau of Prisons

[ ] before 2 p.m. on _____.

[ ] as notified by the United States Marshal.

[ ] as notified by the Probation Office.

RETURN

I have executed this Judgment as follows:

_____

_____

_____

_____

Defendant delivered on_____to_____at _____, with a certified copy of this judgment.

_____
United States Marshal

By _____
Deputy Marshal

FINE WITH SPECIAL ASSESSMENT

The defendant shall pay to the United States the sum of $50.00, consisting of a fine of $-0- and a special assessment of $50.00.

[X] These amounts are the totals of the fines and assessments imposed on individual counts, as follows:

Count 1.

The Court has determined that defendant does not possess the financial ability to pay additional fines and waives imposition of said fines or alternative sanctions.

This sum shall be paid [X] immediately.
[ ] as follows:

[ ] The Court has determined that the defendant does not have the ability to pay interest. It is ordered that:

[ ] The interest requirement is waived.

[ ] The interest requirement is modified as follows:

RESTITUTION, FORFEITURE, OR OTHER PROVISIONS OF THE JUDGMENT

The defendant shall pay restitution to the United States Government in the amount of $636.47, within 6 months, thru the U.S. Attorney.

United States Court of Appeals,
Eleventh Circuit,

Sept. 28, 1992.

UNITED STATES of America,
Plaintiff-Appellee,

v.

John Patrick LITEKY, Charles Joseph Liteky, Roy Lawrence Bourgeois,
Defendants-Appellants.

No. 91-8577.

Appeals from the United States District Court for the Middle District of Georgia

Before ANDERSON, Circuit Judge, HILL and ESCHBACH*, *Senior Circuit Judges.*

PER CURIAM.

In 1990, Charles Liteky, Patrick Liteky, and Father Roy Bourgeois spilled blood on federal property as part of a protest against the United States' involvement in El Salvador. The defendants were convicted of violating 18 U.S.C. § 1361, which prohibits "willfully injur[ing] . . . any property of the United States. . . . " Before the trial, the defendants requested that the district judge recuse himself, *see* 28 U.S.C. § 144; 28 U.S.C. § 455(a), because he had presided over Father Bourgeois' 1983 conviction, which also related to a protest regarding United States policy toward El Salvador. But matters arising out of the course of judicial proceedings are not a

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* Honorable Jesse E. Eschbach, Senior U.S. Circuit Judge for the Seventh Circuit, sitting by designation.

proper basis for recusal. *United States v. Alabama*, 828 F.2d 1532, 1540 (11th Cir. 1987), *cert. denied*, 487 U.S. 1210, 108 S.Ct. 2857, 101 L.Ed.2d 894 (1988); *In re Corrugated Container Antitrust Litigation*, 614 F.2d 958 (5th Cir.), *cert. denied*, 449 U.S. 888, 101 S.Ct. 244, 661 L.ED.2d 114 (1980); *Davis v. Board of School Comrs.*, 517 F.2d 1044 (5th Cir.1975), *cert. denied*, 425 U.S. 944, 96 S.Ct. 1685, 48 L.Ed.2d 188 (1976). Therefore, the district court properly rejected the motion. The defendants also contend that the district court denied them a fair trial. After carefully reviewing the defendants' arguments as well as the record on appeal, we have concluded that those arguments are without merit.

Conclusion

We AFFIRM the convictions.

United States Court of Appeals
FOR THE ELEVENTH CIRCUIT
No. 91-8577

District Court Docket No. CR91-93

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

versus

JOHN PATRICK LITEKY,
CHARLES JOSEPH LITEKY,
ROY LAWRENCE BOURGEOIS,

Defendants-Appellants.

Appeals from the United States District Court
for the Middle District of Georgia

Before ANDERSON, Circuit Judge, HILL and ESCHBACH*, Senior Circuit Judges.

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* Honorable Jesse E. Eschbach, Senior U.S. Circuit Judge for the Seventh Circuit, sitting by designation.

Entered: September 28, 1992
For the Court: Miguel J. Cortez, Clerk
By: /s/ Karleen Illegible
Deputy Clerk

ISSUED AS MANDATE: Oct. 20, 1992

JUDGMENT

This cause came to be heard on the transcript of the record from the United States District Court for the Middle District of Georgia, and was argued by counsel;

ON CONSIDERATION WHEREOF, it is now hereby ordered and adjudged by this Court that the judgments of convictions of the said District Court in this cause be and the same are hereby AFFIRMED.

Supreme Court of the United States

No. 92-6921

John Patrick Liteky, Charles Joseph Liteky
and Roy Lawrence Bourgeois,

Petitioners

v.

United States

ON PETITION FOR WRIT OF CERTIORARI to the United States Court of Appeals for the Eleventh Circuit.

ON CONSIDERATION of the motion for leave to proceed herein in forma pauperis and of the petition for writ of certiorari, it is ordered by this Court that the motion to proceed in forma pauperis be, and the same is hereby, granted; and that the petition for writ of certiorari be, and the same is hereby, granted.

May 24, 1993

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(6)

No. 92-6921

In The

Supreme Court of the United States

October Term, 1993

JOHN PATRICK LITEKY, CHARLES JOSEPH LITEKY, AND ROY LAWRENCE BOURGEOIS,

Petitioners,

v.

UNITED STATES OF AMERICA,

Respondent.

On Writ Of Certiorari To The United States Court Of Appeals For The Eleventh Circuit

PETITIONERS' BRIEF

PETER THOMPSON
(Appointed by this Court)
THOMPSON, LUNDQUIST & SICOLI, LTD.
2520 Park Avenue South
Minneapolis, Minnesota 55404
(612) 871-0708

OF COUNSEL:

IAN PITZ
ARNOLD & PORTER
1200 New Hampshire Ave., N.W.
Washington, D.C. 20036
(202) 872-6700

Counsel for Petitioners

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

550

QUESTION PRESENTED

WHETHER 28 U.S.C. § 455(a), WHICH PROVIDES THAT "ANY JUDGE . . . SHALL DISQUALIFY HIMSELF IN ANY PROCEEDING IN WHICH HIS IMPARTIALITY MAY REASONABLY BE QUESTIONED," REQUIRES THAT THE CAUSE OF THE APPEARANCE OF BIAS STEM FROM AN EXTRA-JUDICIAL SOURCE?

Liljeberg v. Health Serv. Acquisition Corp., 486 U.S. 847 (1988)

United States v. Chantal, 902 F.2d 1018 (1st Cir. 1990)

United States v. Coven, 662 F.2d 162 (2d Cir. 1981, *cert. denied*, 456 U.S. 916 (1982)

PARTIES TO PROCEEDING

The following persons have an interest in the outcome of this case.

Petitioner John Patrick Liteky

Petitioner Charles Joseph Liteky

Petitioner Roy Lawrence Bourgeois

United States Department of Justice

Judge L. Robert Elliott

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OPINION BELOW

This appeal arises from the judgment of the Eleventh Circuit Court of Appeals dated September 28, 1992 which affirmed the decision of the United States District Court for the Middle District of Georgia. *United States v. Liteky*, 973 F.2d 910 (11th Cir. 1992).

JURISDICTION

Petitioners John Liteky, Charles Liteky and Roy Bourgeois were convicted of willfully injuring federal property in violation of 18 U.S.C. § 1361. They were sentenced to guideline terms of six months, six months and 18 months, respectively. The United States Court of Appeals for the Eleventh Circuit affirmed the decision of the district court in a published opinion filed September 28, 1992. This court has jurisdiction to review the judgment of the Court of Appeals pursuant to 28 U.S.C. § 1254(1).

FEDERAL STATUTE INVOLVED

Title 28, U.S.C. § 455(a) provides:

> Any justice, judge, or magistrate of the United States shall disqualify himself in any proceeding in which his impartiality might reasonably be questioned.

STATEMENT OF THE CASE

On November 16, 1990, Father Roy Bourgeois, a Catholic priest, Charles Liteky, a former Catholic priest and Congressional Medal of Honor recipient, and John Liteky, a peace activist and former seminarian, entered Fort Benning Military Reservation, accompanied be members of the media. *See* Trial Transcript, *United States v. Liteky*, Case No. 91-93-COL, 251-52 (M.D. Ga. Mar. 25, 1991) ("1991 Trans."). While on the premises of the Fort Benning Military Reservation, defendants poured blood on the Army School of the Americas to protest the killings of six Jesuit priests, their housekeeper and her daughter in El Salvador on November 16, 1989 by School of the Americas trainees.[1]

For this conscience-motivated, nonviolent act of civil disobedience, defendants were charged with willfully injuring property of the United States in violation of 18 U.S.C. § 1361. Judge J. Robert Elliott presided over the defendants' joint jury trial. Both during pretrial motions and during the course of the trial, defendants moved for Judge Elliott to recuse himself pursuant to 18 U.S.C. § 455(a). The court denied the pretrial motion by written order. Order on Defendants' Motion to Recuse (Feb. 25, 1991) (Appendix to Petition for a Writ of Certiorari ("Pet. for Cert.") at A19-A20). Judge Elliott also denied the Defendants' Motion For Recusal made during trial from the bench. 1991 Trans. at 201.

[1] The three defendants also distributed literature at the School of the Americas that day which described in detail the reason the defendants poured blood on government property. 1991 Trans. at 180-81, 188-91, 196-200. The defendants undertook their actions at the School of the Americas with the purpose of "making holy that place with a relic from the martyrs." 1991 Trans. at 270-71.

Defendants' pretrial recusal motion was predicated, in large part, upon the transcript of a 1983 prosecution of Father Bourgeois and his codefendants before Judge Elliott. Defendants' Motion to Recuse (filed February 4, 1991) (Joint Appendix, p.2). The 1983 bench trial involved similar acts of civil disobedience. The government charged Father Bourgeois with a series of petty misdemeanors committed at the Fort Benning Military Reservation in protest over the government's policies in El Salvador.[2]

Defendants' pretrial Motion for Recusal alleged that Judge Elliott's conduct in the course of the 1983 trial would lead an objective observer to reasonably question Judge Elliott's impartiality in conducting defendants' 1991 trial.[3] *Id.* Judge Elliott denied the motion without even considering Father Bourgeois' claim that the 1983 trial gave rise to an appearance of bias. Order on Defendants' Motion to Recuse (Feb. 25, 1991) (Appendix to Pet. for Cert. at A19). Judge Elliott refused to consider Defendants' Motion for Recusal because he believed that "all allegations of bias resulting from that [1983] trial arise out of matters occurring during the course of that case.

[2] Father Bourgeois was convicted in 1983 for trespass on government property, unlawfully wearing a military uniform and misdemeanor assault.

[3] The events at both the 1983 and 1991 trials which would lead an objective observer to doubt Judge Elliott's impartiality are more thoroughly discussed in Part ID, *infra*.

Matters arising out of the course of judicial proceedings are not a proper basis for recusal under . . . Title 18 [sic] United States Code Section 455." *Id.* (citations omitted).

Counsel for Father Bourgeois also moved for Judge Elliott's recusal during the course of the 1991 trial as a result of Judge Elliott's unfortunate and unnecessarily demeaning and confrontational attitude towards the defendants at that trial. 1991 Trans. at 201. The jury selection, the opening statements, the prosecution's case and the defendants' case were consistently punctuated, usually without objection from the prosecution, by Judge Elliott's interruptions and demeaning comments toward the defense. Following one of Judge Elliott's comments, which gave rise to a reasonable doubt as to his ability to conduct the proceedings in an impartial manner, Father Bourgeois' attorney renewed Defendants' Motion to Recuse, stating "the court indicated that it would not consider matters arising out of the course of judicial proceedings. . . . I would submit to the court that based on a proper analysis of the recusal motion that the proper standard for the Court to look at under 455 would be to include matters arising in judicial proceedings." 1991 Trans. at 202. The court denied defendants' motion without explanation. 1991 Trans. at 203.

Following a one and one-half day jury trial, Father Bourgeois and the Litekys were convicted of willfully injuring property of the United States. Judge Elliott

sentenced each of them, on June 21, 1991, to guideline prison terms.[4]

Defendants thereupon appealed their convictions to the United States Court of Appeals for the Eleventh Circuit, alleging that Judge Elliott had erroneously refused to consider whether his conduct during the 1983 trial of Father Bourgeois gave rise to an appearance of impropriety and that his conduct during the 1991 trial deprived the defendants of a fair trial. The Eleventh Circuit affirmed defendants' convictions. *United States v. Liteky,* 973 F.2d 910 (11th Cir. 1992).

The Supreme Court granted certiorari to consider whether an appearance of bias which arises in the course of judicial proceedings can require recusal under 28 U.S.C. § 455(a).

ARGUMENT

A guarantee of an impartial judge is essential to a fair and effective judicial system. *Ward v. Village of Monroeville,* 409 U.S. 57, 62 (1972) (Constitution requires a neutral and detached judge); *In re Murchison,* 349 U.S. 133, 136 (1955). In addition to guarding against judicial bias-in-fact, Congress has been vigilant to ensure the "appearance of impartiality." H.R. Rep. No. 1453, 93d Cong., 2d Sess. 1, *reprinted in* 1974 U.S.C.C.A.N., 6351, 6354 ("House Report"). "[T]he protection of the integrity

[4] Father Bourgeois received an 18 month prison term for his act of civil disobedience. The Litekys each received six months. All three defendants have served their prison terms.

and dignity of the judicial process from any hint or appearance of bias is the palladium of our judicial system." *Potashnick v. Port City Constr. Co.*, 609 F.2d 1101, 1111 (5th Cir.), *cert. denied*, 449 U.S. 820 (1980) (quoting *United States v. Columbia Broadcastinq Sys., Inc.*, 497 F.2d 107, 109 (5th Cir. 1974)); *see also Liljeberg v. Health Serv. Acquisition Corp.*, 486 U.S. 847, 865 (1988) ("it is critically important . . . to identify the facts that might reasonably cause an objective observer to question [a judge's] impartiality"). The "appearance of impartiality is virtually as important" to the smooth functioning of a fair judicial system as is the fact of impartiality. *Webbe v. McGhie Land Title Co.*, 549 F.2d 1358, 1361 (10th Cir. 1977).

To ensure freedom from both bias-in-fact and the appearance of bias, Congress has adopted two alternate and independent statutes which require judicial disqualification for bias. 28 U.S.C. § 144; 28 U.S.C. § 455. In 1911, Congress adopted 28 U.S.C. § 144, which provides,

> Whenever a party to any proceeding in a district court makes and files a timely and sufficient affidavit that the judge before whom the matter is pending has a personal bias or prejudice either against him or in favor of an adverse party, such judge shall proceed no further therein, but another judge shall be assigned to hear such proceeding.

Courts have uniformly held that the language "personal bias or prejudice" in § 144 required recusal only for

bias personally acquired, as opposed to judicial bias. *United States v. Grinnell Corp.*, 384 U.S. 563, 583 (1966).[5]

In 1974, Congress amended § 455 to "improve judicial machinery by . . . broaden[ing] and clarify[ing] the grounds for judicial disqualification." House Report at 6357. Section 455 provides, in pertinent part,

> Any justice, judge, or magistrate of the United States shall disqualify himself in any proceeding in which his impartiality might reasonably be questioned.

28 U.S.C. § 455(a).

Section 455(a), as amended, abandoned the "duty to sit" rule, which urged judges to resolve questions of recusal in favor of a "duty to sit." House Report at 6355. The new § 455(a) requires a judge to recuse herself in any proceeding in which her impartiality might reasonably be questioned. 28 U.S.C. § 455(a). Indeed, § 455(a) recognizes that the appearance of impartiality is so central to notions of justice that any question of bias is sufficient to require recusal under that section. *See Liljeberg*, 486 U.S. at 861 (requiring recusal even where judge was unaware of disqualifying circumstances). *Roberts v. Bailar*, 625 F.2d

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[5] The amended 28 U.S.C. § 455(b)(1) also limits motions for recusal brought under that section to motions predicated on "personal bias or prejudice concerning a party, or personal knowledge of disputed evidentiary facts concerning the proceeding." 28 U.S.C. § 455(b)(1) (1993). Courts have similarly construed the phrase "personal bias or prejudice" in § 455(b)(1) as referring only to bias or prejudice acquired outside a judicial proceeding. *See, e.g., United States v. Page*, 828 F.2d 1476, 1481 (10th Cir.), *cert. denied*, 484 U.S. 989 (1987); *United States v. Coven*, 662 F.2d 162, 168 (2d Cir. 1981), *cert. denied*, 456 U.S. 916 (1982).

125, 129 (6th Cir. 1980) (disqualification required even where question is close); *Potashnick*, 609 F.2d at 1111 ("[a]ny question of a judge's impartiality threatens the purity of the judicial process and its institutions").

In the case at Bar, Judge Elliott displayed an appearance of bias against Father Bourgeois and his codefendants as a result of his participation in a previous case involving Father Bourgeois. Defendants twice asked Judge Elliott to consider recusing himself to avoid the appearance of impropriety created by his participation in prior proceedings. Judge Elliott declined even to consider the allegations of appearance of bias, relying on ill-reasoned Fifth Circuit opinions which hold that 28 U.S.C. § 455(a) does not require recusal for bias obtained during the course of judicial proceedings. Order on Defendants' Motion to Recuse (citing *In re Corrugated Container Antitrust Litig.*, 614 F.2d 958 (5th Cir. 1980), *cert. denied*, 449 U.S. 888 (1980) and *Davis v. Board of School Comm'rs*, 517 F.2d 1044 (5th Cir. 1975), *cert. denied*, 425 U.S. 944 (1976)).

Because Judge Elliott's decision not to consider Defendants' Motion for Recusal rested on an interpretation of § 455(a) that is inconsistent with the wording, history and policy underlying that section, defendants' convictions should be reversed and the case remanded for retrial before a different judge. Judge Elliott's error is an "ice cold" issue of law. *See United States v. Chantal*, 902 F.2d 1018, 1019 n.1 (1st Cir. 1990). This Court, therefore. should review that decision *de novo*.

I. APPEARANCE OF BIAS WHICH ARISES IN THE COURSE OF JUDICIAL PROCEEDINGS REQUIRES RECUSAL UNDER 28 U.S.C. § 455(a)

Whether 28 U.S.C. § 455(a) requires that a judge's bias stem from a nonjudicial source has been a matter of considerable scholarly and jurisprudential debate over the last several years. *See, e.g.*, Seth E. Bloom, *Judicial Bias and Financial Interest as Grounds for Disqualification of Federal Judges*, 38 Case Western Reserve L. Rev. 662, 670-76 (1985) ("Bloom, *Judicial Bias*"); Susan B. Hoekema, Comment, *Questioning the Impartiality of Judges: Disqualifying Federal District Court Judges Under 28 U.S.C. § 455(a)*, 60 Temple L.Q. 697, 714-17 (1987) ("Hoekema, *Questioning Impartiality of Judges*"); Randall J. Litteneker, Note, *Disqualification of Federal Judges for Bias and Prejudice*, 45 U. Chi. L. Rev. 236, 254-57 (1978) ("Litteneker, *Disqualification of Federal Judges*").

The United States Circuit Courts of Appeal are irreconcilably divided over whether bias which results from a judge's involvement in judicial proceedings concerning parties to a later action can require recusal under 28 U.S.C. § 455(a). *See Waller v. United States*, 112 S. Ct. 2321 (1992) (White, J., dissenting from denial of certiorari) (describing circuit split concerning application of the extra-judicial source requirement to 28 U.S.C. § 455(a)).

The First and Second Circuits have authored decisions explaining that the 1974 amendments to § 455(a) abandoned the extra-judicial source requirement. *See, e.g., United States v. Chantal*, 902 F.2d 1018, 1022 (1st Cir. 1990); *United States v. Cepeda Penes*, 577 F.2d 754, 758 (1st Cir. 1978); *United States v. Coven*, 662 F.2d 162, 168 (2d Cir.

1981), *cert. denied*, 456 U.S. 916 (1982). In *Chantal*, Judge John Brown, sitting by designation from the Fifth Circuit, offered the most thorough and well-reasoned analysis of whether appearance of bias acquired in the courtroom requires recusal under § 455(a). 902 F.2d at 1019-23.

At a 1987 sentencing hearing, the district judge in *Chantal* strongly condemned the defendant for his role in a drug-related incident. *Id.* at 1019-20. Chantal was subsequently indicted again on similar grounds and his case was assigned to the same judge. Chantal then filed a motion urging the trial judge to recuse himself, alleging that his forceful remarks made at the sentencing hearing raised a substantial question as to his impartiality. *Id.* at 1020. The trial judge declined to recuse himself and shortly thereafter Chantal entered a plea of guilty to the second indictment. *Id.*

The First Circuit reversed defendant's conviction, finding that the district court had applied the wrong standard in considering Chantal's recusal motion. *Chantal* unequivocally explained that "the source of the asserted bias/prejudice in a § 455(a) claim can originate explicitly in judicial proceedings." *Id.* at 1022.

Similarly, in *Coven*, the Second Circuit held that § 455(a) "does not contain the requirement that to be disqualifying bias must spring from an extrajudicial source." 662 F.2d at 168. The conclusions reached by the *Chantal* and *Coven* courts are consistent with commentators' interpretations of the statute. All commentators to consider the issue agree that § 455(a) also applies to bias which arises during the course of judicial proceedings. Bloom, *Judicial Bias*, at 670-76; Hoekema, *Impartiality of*

Judges at 715-17; Litteneker, *Disqualification of Federal Judges*, at 254-57.

In contrast, the Fourth, Fifth, Seventh, Ninth, Eleventh and District of Columbia Circuits have insisted that appearance of bias which arises as a result of a judge's participation in a prior judicial proceeding does not require recusal under § 455(a). *See, e.g., United States v. Mitchell*, 886 F.2d 667, 671 (4th Cir. 1989); *United States v. Merkt*, 794 F.2d 950, 960 (5th Cir. 1986), *cert. denied*, 480 U.S. 946 (1987); *Corrugated Container Antitrust Litig.*, 614 F.2d at 964-65; *Davis*, 517 F.2d at 1051-52; *United States v. Bond*, 847 F.2d 1233, 1241 (7th Cir. 1988); *United States v. Sibla*, 624 F.2d 864, 867 (9th Cir. 1980); *McWhorter v. City of Birmingham*, 906 F.2d 674, 678 (11th Cir. 1990); *United States v. Alabama*, 828 F.2d 1532, 1541 (11th Cir. 1987), *cert. denied*, 487 U.S. 1210 (1988); *United States v. Barry*, 961 F.2d 260, 263 (D.C. Cir. 1992).

Some courts have construed 28 U.S.C. §§ 144 and 455(a) *in pari materia* and, therefore, applied § 144's requirement that any bias be "personally," as opposed to judicially, acquired. *Davis*, 517 F.2d at 1052; *Corrugated Container Antitrust Litig.*, 614 F.2d at 965. Others have concluded that § 455(a) should be read in conjunction with § 455(b)(1), which also permits recusal for only "personal" or nonjudicial bias. *Sibla*, 624 F.2d at 867. Most courts which have concluded that appearance of bias which arises in the course of a judicial proceeding is irrelevant for recusal inquiry under § 455(a), however, have offered absolutely no justification for this approach. Rather, many of the decisions which parrot the extrajudicial source requirement simply chant the familiar, but misguided, mantra: "a judge's rulings in the same or a

related case may not serve as the basis for a recusal motion." *McWhorter*, 906 F.2d at 678; *see also Mitchell*, 886 F.2d at 671; *Bond*, 847 F.2d at 1241.

Other circuits have manifested some confusion as to whether § 455(a) requires extra-judicial bias or have authored inconsistent rulings. For example, *United States v. Sammons*, 918 F.2d 592, 599 (6th Cir. 1990), *denial of post conviction relief aff'd*, 963 F.2d 373 (6th Cir. 1992), *petition for cert. filed*, No. 92-8935 (U.S. Jan. 4, 1993), in conclusory fashion, insisted that "prejudice or bias must be personal or extrajudicial in order to justify recusal under § 455(a)." This decision, however, is inconsistent with prior opinions in *Nicodemus v. Chrysler Corp.*, 596 F.2d 152, 156-57 (6th Cir. 1979) and *Roberts v. Bailar*, 625 F.2d 125, 128-30 (6th Cir. 1980). *Nicodemuss*, on the basis of § 455(a), disqualified the district judge from participating further in the proceedings as a result of statements at a pretrial hearing that reflected an appearance of bias. 596 F.2d at 157, n.10. Similarly, in *Roberts*, the trial judge's statements at a pretrial hearing gave rise to a duty to recuse himself under § 455(a). 625 F.2d at 129.

United States v. Prichard, 875 F.2d 789, 791 (10th Cir. 1989) stated flatly, without accompanying analysis, "recusal must be predicated on extra-judicial conduct." This decision stands in stark contrast to the Tenth Circuit's prior opinion in *Webbe*, which found that the district court's pronouncement at a hearing on pretrial dispositive motions that the defendant insurance company was "stuck," before permitting counsel for the insurance company to address the court, gave rise to an appearance of partiality. 549 F.2d at 1361. *Webbe* found

that the district judge was disqualified from further proceedings in the case under § 455(a) despite the fact that his appearance of bias arose directly as a result of his participation in a judicial proceeding.[6]

Of all decisions to address this issue, the *Chantal* and *Coven* opinions are the most persuasive. The statutory language, legislative history and purpose of § 455(a) do not support a distinction between judicial and non-judicial bias as the basis of a motion for recusal. The central issue under § 455(a) should be whether there is a question about the district judge's appearance of bias against one of the parties in the case at trial, not where that bias arose. Consequently, the Court should avail itself of this opportunity to reject the extra-judicial source requirement.

A. The Language of 28 U.S.C. § 455(a) Supports An Interpretation That Any Reasonable Question As To a Judge's Impartiality, Regardless of Source, Requires Disqualification

The plain language of § 455(a) *requires* recusal *any* time that the statutory criteria are met. *Liljeberg*, 486 U.S. at 861; *Potashnick*, 609 F.2d at 1111. The text of § 455(a)

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[6] The Third and Eighth Circuits have apparently not addressed the extra-judicial source requirement under § 455(a). Two well-reasoned district court decisions in the Eighth Circuit, however, found that appearance of bias which arises in the course of a judicial proceeding requires recusal under § 455(a). *United States v. Conservation Chem. Co.*, 106 F.R.D. 210, 234 (W.D. Mo. 1985); *United States v. Singer*, 575 F. Supp. 63, 67-68 (D. Minn. 1983).

does not purport to limit this requirement to situations where an appearance of bias arose outside a court room. *Cf. Liljeberg*, 486 U.S. at 859 ("[t]o read § 455(a) to provide that the judge must know of the disqualifying fact, requires . . . ignoring the language of the provision – which makes no mention of knowledge"). Furthermore, Congress's choice of certain words in drafting § 455(a) reflects its desire to abandon the extra-judicial source requirement of § 144.

"[U]se of the word 'might' in the statute was intended to indicate that disqualification should follow if the reasonable man, were he to know *all the circumstances*, would harbor doubts about the judge's impartiality." *Potashnick*, 609 F.2d at 1111 (emphasis added). In § 455(a), Congress clearly did not intend to limit the circumstances which require recusal to those which occur in an extra-judicial setting. If Congress had intended to so limit the circumstances requiring recusal, it would have used language similar to § 144; language very different from that of § 455(a).

Prior to the 1974 amendments to 28 U.S.C. § 455, courts recognized that the term "personal" bias or prejudice in § 144 only applied to bias that a judge acquired off the bench. *Grinnell Corp.*, 384 U.S. at 583; *see also United States v. Page*, 828 F.2d at 1481 (construing the "personal knowledge" requirement of 28 U.S.C. § 455(b)(1)). Thus, under § 144, for "[t]he alleged bias and prejudice to be disqualifying [it] must stem from an extrajudicial source and result in an opinion on the merits on some basis other than what the judge learned from his participation in the case." *Grinnell Corp.*, 384 U.S. at 583.

Importantly, § 455(a) does not include language which requires a "*personal* bias or prejudice." 28 U.S.C. § 455(a). The absence of the modifier "personal" in § 455(a) is significant because Congress amended that section in light of the long line of cases holding that "personal," as used in § 144, implied "extra-judicial." *Coven*, 662 F.2d at 167-68 (citing *Grinnell Corp.*, 384 U.S. at 583 and *United States v. Bernstein*, 533 F.2d 775, 785 (2d Cir.), *cert. denied*, 429 U.S. 998 (1976)). *Coven* found that "[a]gainst this background, it is clear that by amending § 455 Congress intended to transfer the extrajudicial bias limitation contained in § 144 to § 455(b)(1)" by including the phrase "personal bias or prejudice." 662 F.2d at 168. The Court went on to point out, however, that "[s]ection 455(a) does not contain the term 'personal' found in § 455(b)(1)." *Id.* Recognizing this distinction, the Second Circuit maintains that a judge's conduct in proceedings before her can form a basis for recusal. *Id.*

Congress's decision not to require personal bias for the purposes of § 455(a) reflected a calculated decision to expand the scope of recusal and to abandon the extra-judicial source requirement. Consistent with this interpretation, the text of § 455(a) is sweeping, requiring recusal "in any proceeding in which [a judge's] impartiality might reasonably be questioned." 28 U.S.C. § 455(a). This broad language reflects Congress' desire to avoid the appearance of bias, regardless of the setting in which it rears its head. *Chantal*, 902 F.2d at 1023-24.

B. The History of 28 U.S.C. § 455(a) Demonstrates Congress' Intent to Abandon the Extra-Judicial Source Requirement

Section 455(a) reflects Congress' intent to ensure that all parties receive a fair trial, free of any appearance of judicial bias. *See Liljeberg*, 486 U.S. at 860. The amendments to § 455(a) liberalized the recusal process in a number of ways.

First, the 1974 amendments changed § 455(a) to ensure that disqualification decisions were based on an objective, reasonable person standard, rather than a judge's subjective determination of bias. *Chantal*, 902 F.2d at 1022. The amended § 455(a) also requires a district judge to recuse herself wherever any question about the court's impartiality arises. Under the new § 455(a), "[e]ven where the question is close, the judge whose impartiality might reasonably be questioned must recuse himself from the trial." *Roberts*, 625 F.2d at 129. Given Congress' stated desire to broaden the grounds for recusal, it is unreasonable to assume that, without explicitly stating, Congress intended to exclude from consideration all bias which arises in the course of a judicial proceeding.

Furthermore, the 1974 amendments were concerned, above all else, with the *appearance* of impartiality.[7] House Report at 6355; *Liljeberg*, 486 U.S. at 861. Neither Congress, nor any of the courts which have applied the extra-judicial source requirement to § 455(a), have articulated a

[7] Prior to the 1974 amendments, recusal under § 144 was governed by a "bias-in-fact" standard. House Report at 6355.

basis for the belief that an appearance of bias which arises in a judicial setting is any less a threat to the public's confidence in the judiciary than an appearance of bias which arises from a judge's personal activities.

Moreover, Congress explained that subsection (a) of § 455 is a "catch-all" provision. House Report at 6354. It is difficult to imagine how § 455(a) could effectively function as a "catch-all" if an entire category of bias, that acquired through participation in judicial proceedings, is *per se* excluded from consideration on motion for recusal.

That Congress intended § 455(a) to apply as a "catch-all" also suggests that the Ninth Circuit decisions, and those decisions which have followed Ninth Circuit precedent, are wrongly decided. The Ninth Circuit bases its application of the extra-judicial source requirement to § 455(a) on the erroneous assumption that §§ 455(a) and 455(b)(1) do not contain separate and independent grounds for recusal. *Sibla*, 624 F.2d at 867. To the extent that § 455(a) is a "catch all," it is clear that Congress intended the section to be not only independent of § 455(b)(1), but also considerably broader. For this reason it is inappropriate for courts, without express authorization from Congress, to read the language "personal bias and prejudice," contained in § 455(b)(1), into § 455(a). *Cf. Liljeberg*, 486 U.S. at 859 n.8 (declining to construe § 455(a) in light of § 455(b)(4)'s scienter requirement).

The legislative history of the 1974 amendments to § 455 also exposes the inadequacies of the *Davis* and *Corrugated Container Antitrust Litigation* decisions, the only other opinions which articulate any justification for imposing an extra-judicial source requirement. *Davis*, 517

F.2d at 1051-52; *Corrugated Container Antitrust Litig.*, 614 F.2d at 965. These decisions are premised on the assumption that §§ 144 and 455 should be read *in pari materia. Id.* This rationale, however, fails for the simple reason that these two sections are not, and were never intended to be, *in para materia.*

It is difficult to imagine how any court could reason that §§ 144 and 455, adopted 63 years apart, should be read as companion legislation. *See* Bloom, *Judicial Bias* at 675-76. Moreover, since Congress's avowed purpose in amending § 455 was to liberalize procedures and broaden the grounds for recusal, it is clear that Congress did not intend the same legal standards to apply to both sections. *Chantal*, 902 F.2d at 1023-24. Indeed, for the most part, courts have not applied the same legal standards.[8]

Finally, §§ 144 and 455(a) contain different procedural requirements. Section 455(a) is self-enforcing and does not require an affidavit or motion of party. Section 144 requires the execution of an affidavit by the party moving for recusal. *United States v. Alabama*, 828 F.2d at 1540-41.

The Fifth Circuit decisions which impose an extra-judicial source requirement are incorrect in assuming that

[8] Although § 144 requires recusal only where there is evidence of actual bias, § 455(a) applies to require disqualification for an appearance of bias. *Liljeberg*, 486 U.S. at 861. Although § 144 permits a judge to subjectively determine his own bias, § 455(a) applies an objective test. House Report at 6354-55.

§§ 144 and 455(a) are governed by the same legal standards.[9] Rather, Congress enacted § 455(a) for the expressed purpose of creating different, and broader, standards to govern the recusal process. "Congress established by the detailed provisions of § 455(a) *an entirely new concept* of acceptable judicial disqualification." *Chantal*, 902 F.2d at 1021 (emphasis added).

C. Compelling Public Policy Considerations Justify Considering Judicially-Acquired Bias In Evaluating Motions For Recusal Brought Pursuant to 28 U.S.C. § 455(a)

In addition to flying in the face of the textual mandates of § 455 and the avowed intent of Congress, the extra-judicial source requirement, when applied to § 455(a), creates a rule of law inconsistent with both traditional notions of fairness and with the federal courts' inherent authority to disqualify judges for an appearance of bias or prejudice. "The appropriate focus under § 455(a) is not whether the judge's statement springs from an extra-judicial source but instead whether the judge's statement or action would lead a reasonable person to question whether the judge would remain impartial." Hoekema, *Questioning the Impartiality of Judges*, at 1717. Bias or prejudice against a party which arises in the course of a judicial proceeding is no less inimical to the

[9] For precisely these reasons, commentators have sharply criticized both the Fifth and Ninth Circuit Courts of Appeal decisions which have imposed an extra-judicial source requirement. Bloom, *Judicial Bias*, at 675-76; Hoekema, *Questioning the Impartiality of Judges*, at 248-49.

interests safeguarded by 28 U.S.C. § 455(a) than is bias which arises elsewhere. Similarly, in achieving the congressionally articulated goal of public confidence in the judicial system, it does not matter whether an appearance of impropriety arises on a golf course, at a cocktail party, in a Las Vegas bath house, or in a court of law. The prejudicial effect of an appearance of bias is identical regardless of where that bias arises and the remedy provided by § 455(a) should also be identical.

Judges and commentators alike have also raised concerns about the accountability of federal judges in a system which immunizes them from criticism for bias merely because it arises, or is displayed, in a courtroom. "[T]he fact that the source of the judge's bias arises out of or originates in judicial proceedings [does not] immunize the judge from the inquiry whether such factor would, in the mind of a reasonable person, raise a question about the judge's impartiality." *Chantal*, 902 F.2d at 1023-24; *see also* Hoekema, *Questioning the Impartiality of Judges*, at 715 (rigid application of the extra-judicial source requirement creates a "zone of immunity" in which to voice prejudice).[10]

If anything, an appearance of bias which arises at trial is more hazardous to the interests of justice than bias

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[10] This concern is particularly important because litigants are often familiar with judges only through their courtroom conduct. Excluding evidence of courtroom acquired bias deprives litigants of what is often their only opportunity to demonstrate that a particular judge is biased against them. The zone of immunity is especially troubling for Article III judges, who are appointed for life terms, without any degree of public accountability through the electoral process.

which arises elsewhere. When a judge joins sides, in the full view of the jury and the public, the parties, the jury and the public become "overawed . . . and confused." *Nicodemus*, 596 F.2d at 156 (quoting *Reserve Mining Co. v. Lord*, 529 F.2d 181, 186 (8th Cir. 1976)).

The extra-judicial source requirement is also inconsistent with the time-honored rule of law that courts of appeal have the inherent authority to disqualify judges from further participation in a case on remand, due to appearance of bias reflected in earlier proceedings. *See, e.g., Offutt v. United States*, 348 U.S. 11, 16-18 (1954) (establishing appellate courts' supervisory authority to order reassignment); *Haines v. Liggett Group Inc.*, 975 F.2d 81, 97 (3rd Cir. 1992) (district judge's stinging criticism of the tobacco industry "contained in the opinion that is the subject of this petition" required disqualification on remand); *United States v. Jacobs*, 855 F.2d 652, 656 (9th Cir. 1988) (judge's conduct during trial raised the appearance of prejudice and required disqualification on remand). Consistent with its inherent authority, the Eleventh Circuit in *Clark v. Coats & Clark, Inc.*, 990 F.2d 1217, 1229-30 (11th Cir. 1993), disqualified Judge J. Robert Elliott because his courtroom conduct reflected a predisposition to rule against the plaintiff.

These decisions took pains to point out that the test for supervisory removal is the "appearance of impartiality." *Haines*, 975 F.2d at 98; *Jacobs*, 855 F.2d at 656-57; *see also Hermes Automation Technology, Inc. v. Hyundai Elecs. Indus. Co.*, 915 F.2d 739, 752 (1st Cir. 1990) (test for disqualification is "*appearance* of unfairness") (emphasis in original). Importantly, this is exactly the same standard for recusal under § 455(a). *Liljeberg*, 486 U.S. at 860.

Even those courts which apply an extra-judicial source requirement to recusal motions brought under § 455(a) recognize that, for the purposes of exercising their inherent authority to disqualify, it does not matter whether the appearance of a bias arises in a prior judicial proceeding. *Jacobs*, 855 F.2d at 656 & n.2. As a careful reading of *Jacobs* makes clear, this position is inconsistent and indefensible. *Jacobs* candidly admitted that if the facts it faced had arisen on motion for recusal pursuant to § 455(a), it would not have required the district judge's disqualification because the appearance of bias arose in the course of a judicial proceeding. 855 F.2d 656 n.2. Because the issue arose on appeal prior to remand, however, the court used its inherent authority to assign the case to a different judge. *Id.* at 656-57.

The *Jacobs* court's approach thus forbids a judge from even considering a motion to recuse for appearance of bias which arises in the course of judicial proceedings in the first instance, yet permits a court of appeals to exercise its inherent authority, on the same facts, and disqualify the district judge. This approach is, at best, inconsistent and, at worst, hypocritical.[11]

Additionally, courts which apply the extra-judicial source requirement to § 455(a) do so at the cost of judicial

[11] It is particularly ironic that the use of inherent authority to disqualify a district court judge is reserved for "extreme circumstances." *O'Rourke v. City of Norman*, 875 F.2d 1465, 1475 (10th Cir.), *cert. denied*, 493 U.S. 918 (1989). Section 455(a), in contrast, is designed to protect the appearance of impartiality wherever *"[a]ny question* of a judge's impartiality" is raised. *Potashnick*, 609 F.2d at 1111 (emphasis added).

efficiency. In the Ninth Circuit, for example, a district judge is forbidden to recuse himself on the basis of a motion brought under § 455(a) even if that judge recognizes that his views towards a particular party are tainted by participation in a prior judicial proceeding. *Cf., Jacobs* 855 F.2d at 656 n.2 (Section 455(a) did not permit recusal although the Ninth Circuit found appearance of bias).[12] Rather, a judge faced with that situation would be forced to preside over the litigation, only to face reversal and disqualification on appeal.[13]

[12] In this respect, *Jacobs* imposes a type of "duty to sit" on judges who would otherwise recuse themselves. *See also Waller*, 112 S. Ct. at 2322 (White, J., dissenting from denial of certiorari) (district judge acknowledged appearance of bias, but refused to recuse himself because it did not arise from an extra-judicial source). This result is irreconcilable with Congress's stated intention to abandon the duty to sit rule. House Report at 6355.

[13] Interestingly, the only policy based justification that any court has ever advanced for the extra-judicial source requirement is premised on efficiency grounds. *See Corrugated Container Antitrust Litig.*, 614 F.2d at 966 (decrying the notion of "no deposit/no return judges, disposable after one use"). While this concern may have had merit in 1911 when Congress originally enacted 28 U.S.C. § 144, such fears are purely phantom today. As the Fifth Circuit itself explained in a decision authored two months prior to the *Corrugated Container Antitrust Litigation* opinion,

> "we cannot ignore that the disqualification of a judge in any given case does not cause the delay or inconvenience which resulted in prior times. The growing number of federal judges, and the availability of rapid transportation to move those judges from place to place when necessary, make the decision to disqualify much less burdensome on the judicial system than in times past; any inconvenience which does

Perhaps because they recognize the inefficiency and unfairness of the extra-judicial source requirement, many courts, while purporting to uphold that requirement, have nonetheless found that a judge's conduct during trial can require recusal under § 455(a) in some circumstances. Even those courts of appeal which have reflexively adhered to the extra-judicial source requirement have found themselves forced to carve an exception for instances in which a judge's remarks demonstrate "pervasive bias or prejudice." *See e.g., McWhorter*, 906 F.2d at 678; *United States v. Monaco*, 852 F.2d 1143, 1147 (9th Cir. 1988), *cert. denied*, 488 U.S. 1040 (1989).

Thus, these courts recognize that bias acquired in the course of judicial proceedings can, on occasion, justify recusal. Notwithstanding, for no reason authorized by Congress, they hold that judicial bias constitutes grounds for recusal only in the most extreme circumstances. Nothing in § 455(a) justifies a recusal scheme which requires one threshold of appearance of bias when it arises outside a courtroom and a different, and more stringent, standard for bias arising in the course of judicial proceedings.[14]

The extra-judicial source requirement is at odds with the text, history and policy underlying § 455(a). Judge

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arise is more than outweighed by the need to protect the dignity and integrity of the judicial process." *Potashnick*, 609 F.2d at 1112.

[14] Judge Elliott never considered whether Defendants' Motion for Recusal presented evidence of bias sufficiently pervasive to require recusal under § 455(a). Thus, even under Eleventh Circuit law, Judge Elliott's refusal to consider defendants' motion was in error.

Elliott should have considered defendants' allegation that "[t]he trial of September 14, 1983 indicates [Judge Elliott's] impatience, disregard for the defense and animosity towards Father Bourgeois and his beliefs, as well as his similarly situated codefendants." *See* Defendants' Motion to Recuse. For the same reasons, Judge Elliott should have considered defendants' renewed motion for recusal midway through the 1991 trial. 1991 Trans. at 200-01. The Eleventh Circuit's opinion denying defendants' requested relief was similarly in error.

D. Reversal of Defendants' Convictions and Remand for a New Trial Before an Impartial Judge are the Appropriate Remedies for the Misapplication of the Extra-Judicial Source Requirement in This Case

Litigants, and criminal defendants in particular, are entitled to a judge free of bias or prejudice. *Tumey v. Ohio*, 273 U.S. 510 (1927). Where bias or appearance of partiality existed at the trial level, this Court will always reverse a defendant's conviction. *Id.* at 535; *Chapman v. California*, 386 U.S. 18, 23 n.8 (1967) (error concerning judicial impartiality is never harmless). This basic tenet of our judicial system applies with equal force to errors of law committed in interpreting 28 U.S.C. § 455. *See Chantal*, 902 F.2d at 1020, 1024 (reversing defendant's conviction despite the fact that he was "caught red-handed in," and pled guilty to, the crime of which he was charged).

As one leading commentator has argued, "[t]here should be no room in [the recusal statutes] for the concept of harmless error to apply, nor for arguments to be

made that the judge in fact acted in an impartial manner. The disqualification statutes are mandatory and the failure of a judge to step aside if he is indeed disqualified under one of the three statutes should always require reversal." 13A Charles Wright, Arthur Miller & Edward Cooper, *Federal Practice and Procedure*, § 3553 at 657 (2d ed. 1984).

This Court, within the bounds established by *Tumey* and *Chapman*, should establish the remedy for violation of Section 455(a). *Liljeberg*, 486 U.S. at 862. Petitioners request the Court to review the record and find an appearance of bias, reverse their convictions and remand for a new trial. At a very minimum, this Court should reverse petitioners' convictions and remand the case to the Eleventh Circuit to determine whether Judge Elliott's conduct at the 1983 trial, the 1991 trial, and in subsequent proceedings, raised an appearance of bias against Father Bourgeois and his codefendants. *Cf. Chantal*, 902 F.2d at 1024 (reversing defendant's conviction and remanding to district court for proper analysis under § 455(a)).

In *Liljeberg*, Health Services Acquisition Corporation discovered ten months after trial that the judge appeared to have had a serious conflict of interest. 486 U.S. at 850. The judge claimed to be unaware of the conflict at the time he rendered his decision. Although the Court accepted the judge's assertion that he was not aware of the conflict of interest, it vacated the judgment pursuant to Fed. R. Civ. P. 60(b) because it found that an objective observer could reasonably believe that the judge's conduct created an appearance of prejudice. 486 U.S. at 862-63. In reaching its decision, the Court emphasized

that "[t]he very purpose of § 455(a) is to promote confidence in the judiciary by avoiding even the appearance of impropriety whenever possible." 486 U.S. at 865.[15]

In this case, as in *Liljeberg*, this Court should determine that Judge Elliott's conduct requires his disqualification in any future proceedings, reverse defendants' convictions, and remand for a new trial. *Cf. Nicodemus*, 596 F.2d at 157 (court of appeals ordered district judge's recusal pursuant to § 455(a) on the basis of the trial record, without remanding the case to the district judge for reconsideration, even in the absence of a party's

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[15] The Eleventh Circuit has concluded that *Liljeberg* endorses harmless error analysis for errors committed in interpreting § 455. *United States v. Kelly*, 888 F.2d 732, 747 (11th Cir. 1989); *Parker v. Connors Steel Co.*, 855 F.2d 1510, 1527 (11th Cir. 1988), *cert. denied*, 490 U.S. 1066 (1989). These decisions, however, are based on a clear misunderstanding of *Liljeberg* and have been soundly criticized by commentators:

> [In *Liljeberg*], the Supreme Court was shaping an extraordinary remedy for extraordinary situations, and its willingness to do so indicates that violations of § 455(a) are a serious matter. This test was not created for use on direct appeal from a district court's refusal to disqualify herself. The *Liljeberg* opinion does not even remotely suggest or support the proposition that a judge's failure to recuse under § 455(a) may be harmless error. In fact, the opinion suggests quite the opposite – that the statute should be applied strictly.

Kenneth M. Fall, Note, *Liljeberg v. Health Services Acquisition Corp.: The Supreme Court Encourages Disqualification of Federal Judges Under § 455(a)*, 1989 Wisc. L. Rev. 1033, 1058 (1989).

request for recusal).[16] The record in this case requires such relief.

1. Judge Elliott's Conduct During Father Bourgeois' 1983 Trial Reflected An Appearance of Bias Against Him and His Codefendants

At the outset of the 1983 bench trial, Judge Elliott sternly lectured, before the trial had even begun, that the court was not a political forum. *See* Trial Transcript, *United States v. Ventimiglia*, C.A. No. 83-316-COL, 10 (M.D. Ga. Sept. 14, 1983) ("1983 Trans."). Later, Father Bourgeois' attorney cross-examined the alleged victim of the assault with which Father Bourgeois was charged concerning his reaction to Father Bourgeois' act of civil disobedience. Without objection from the prosecuting attorney, the court interrupted this legitimate line of inquiry.[17] 1983 Trans. at 100. Although the prosecution did not object to this cross-examination, which went to

---

[16] Reversal and remand for a new trial would also be consistent with this Court's decisions concerning the inherent authority to disqualify trial judges. *Offutt*, 348 U.S. at 13-15.

[17] A trial judge may interrogate a witness to clarify the witness's testimony or to ensure that a case is fairly tried. It is well settled, however, that the trial judge is not permitted to assume the burden of cross-examination. *United States v. Singer*, 710 F.2d 431, 433-35 (8th Cir. 1983); *United States v. Bland*, 697 F.2d 262, 266 (8th Cir. 1983); *United States v. Daniels*, 572 F.2d 535, 541 (5th Cir. 1978). "A trial judge should seldom intervene in the questioning of a witness and then only to clarify isolated testimony. A trial court should never assume the burden of direct or cross-examination." *Bland*, 697 F.2d at 266. When an attorney is competently examining a witness, it is improper for the trial judge to question that witness. *Daniels*, 572 F.2d at 541.

one of the few disputed factual matters at trial, Judge Elliott undertook to argue with and finally direct defense counsel how to continue with his cross-examination. 1983 Trans. at 100.

The court also interrupted Father Bourgeois' attorney's cross-examination concerning the facts underlying the government's allegations of assault. Prior to Judge Elliott's interjection, the witness testified that Father Bourgeois hit him with an open hand. 1983 Trans. at 96. Judge Elliott, however, without any factual basis, led the witness to testify that Father Bourgeois hit him with a closed fist. 1983 Trans. at 109, 110. This unwarranted restriction on the scope of defendant's cross-examination and the leading of the prosecution's witness indicates that the Court was a government advocate, as opposed to an impartial referee. *Cf. Pfizer Inc. v. Lord*, 456 F.2d 532, 544 (8th Cir.) (requiring "scrupulous fairness and impartiality" in the conduct of litigation), *cert. denied*, 406 U.S. 976 (1972).

The Court's apparent bias against the defendant escalated during the presentation of the defense. The Court refused to hear evidence concerning Father Bourgeois' background, and instead insisted that Father Bourgeois' background information had nothing to do with the trial. 1983 Trans. at 142. The Court also interrupted Father Bourgeois during his testimony and argued with him concerning his testimony's content. 1983 Trans. at 146-7. These interruptions were not precipitated by objection from the prosecution.

During Father Bourgeois' closing argument, Judge Elliott again interrupted, again without objection from

the prosecution, and again admonished Father Bourgeois for testifying about his state of mind.[18] 1983 Trans. 152-53. Similarly, during the closing argument of Father Bourgeois' codefendant Rosebaugh, Judge Elliott not only interrupted without objection, but strongly criticized him for not taking the stand in his own defense. 1983 Trans. at 159-60.[19] An obviously intimidated Father Rosebaugh abandoned further argument.

Moreover, during the entire course of the 1983 trial, the court subtly manifested animosity toward Father Bourgeois by refusing to refer to him by his appropriate title: "Father." 1983 Trans. at 22, 35, 36, 38, 50, 58, 59, 60, 63, 66, 78, 93, 94. The court's discourtesy is highlighted by the fact that Judge Elliott nonetheless referred to numerous Army personnel as "sir" or "Colonel," 1983 Trans. at 26, 40, 47, 57, 69, 71, 133; and in fact addressed the Fort Benning priest as "Chaplain." 1983 Trans. at 64.

Judge Elliott also exhibited an appearance of bias against Father Bourgeois at sentencing. Fed. R. Crim. P. 32(c)(1) requires the court to conduct an investigation and issue a report prior to imposing sentence. The Court failed to order a presentence investigation and did not consider the kind of information called for under Rule 32

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[18] Father Bourgeois did not represent himself *pro se* throughout the 1983 trial, but he did give a closing argument in his own behalf. 1983 Trans. at 150-51.

[19] This condemnation was clearly in error. *See United States v. Griffin*, 380 U.S. 609 (1965) (judge should not comment unfavorably on defendant's decision to invoke self-incrimination privilege).

to make an informed and unbiased judgment as to sentence. In fact, the Court had refused to hear testimony concerning such matters at trial, including defendants' reasons for entering the base and evidence concerning their background, all of which was necessary for the Court to pass a fair sentence. *See, United States v. Hamm*, 786 F.2d 804 (7th Cir. 1984).

Moreover, Judge Elliott imposed a sentence of 18 months for Father Bourgeois' petty offenses by ordering the sentence for each misdemeanor be served consecutively. Imposing consecutive sentences under such circumstances is clearly improper. *See United States v. Bennett*, 623 F.2d 52 (8th Cir. 1980); *Borum v. United States*, 409 F.2d 433 (D.C. Cir. 1967), *cert. denied*, 395 U.S. 916 (1969). Given Father Bourgeois' ideological commitments, his justifications for committing the offenses charged, and the fact that all of his offenses arose from a similar pattern of conscientiously motivated conduct, the unduly harsh sentence, when considered in light of Judge Elliott's conduct throughout the entire trial, gives rise to an appearance of impropriety.

Taken as a whole, Judge Elliott's conduct went far afield from an appearance of impartiality. An objective observer, upon reviewing the 1983 Transcript, would have reason to doubt Judge Elliott's capacity to preside over a trial involving Father Bourgeois in a fair and unbiased manner.

2. Judge Elliott's Conduct During the Course of the 1991 Trial Reflects An Appearance of Bias Against the Defendants

Defendants' original motion to recuse was based solely on their belief that a reasonable person, reviewing Judge Elliott's conduct during the 1983 trial, would find an appearance of bias against Father Bourgeois and his codefendants. In evaluating the appropriate remedy in this case, however, the Court should consider not only the 1983 trial, but events during and after the 1991 trial as well. *Cf. Liljeberg*, 486 U.S. at 855-58 (ordering vacatur and recusal under § 455(a) on the basis of events which occurred following judgment); *Bland*, 697 F.2d at 266 (remarks made after verdict indirectly reveal judge's feelings throughout trial).

During the 1991 trial, Judge Elliott picked up where he left off in 1983. Judge Elliott evidenced an appearance of bias against the defendants through his assumption of cross-examination of certain key witnesses, the anti-defendant tone of his numerous interjections, and his actions in cutting off the defendants' testimony about their state of mind.[20]

It is clear from the record of the 1991 trial that neither Judge Elliott nor Father Bourgeois had forgotten the events of the 1983 trial. 1991 Trans. at 240-42. The court, *sua sponte*, interrupted defense counsel's direct examination of Father Bourgeois, probing the details of the 1983

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[20] Throughout the proceedings, defendants' counsel, in the most trying of circumstances, conducted himself professionally and courteously.

conviction, including whether Father Bourgeois entered the military reservation at night, got up in a tree, and used a loud speaker to broadcast a recorded message. *Id.* Judge Elliott also strongly criticized Father Bourgeois for entering the base without permission and wearing a military uniform while he was not a member of the United States Army. *Id.*

Circuit courts of appeal have repeatedly held that a trial judge's demeaning or one-sided interjections are improper. *See e.g., Chantal*, 902 F.2d at 1019-20; *United States v. Hickman*, 592 F.2d 931, 932-34 (6th Cir. 1979); *Nicodemus*, 596 F.2d at 155-157; *United States v. Sheldon*, 544 F.2d 213, 218-19 (5th Cir. 1976). During the 1991 trial, however, in addition to underscoring government witnesses testimony and cross-examining defendants unnecessarily, the district judge frequently editorialized on important issues, stated his lack of interest in defense testimony, and engaged in assertive pro-prosecution dialogue. Even before the 1991 trial commenced, Judge Elliott threatened to issue bench warrants for defendants' arrest before the entire jury venire because they were unavoidably detained at the metal detector on the first floor of the courthouse. 1991 Trans. at 3-4.

During the government's cross-examination of Father Bourgeois, the prosecutor asked whether he was aware that his actions would damage the property.

> The Witness: When I threw the blood, all I could think of was Selena, Elgar, this is for your. I *didn't think about doing damage* to that –.
>
> The Court: Answer his question.
>
> The Witness: I thought I was.

The Court: No, you're not answering the questions.

The Witness: All I could think of was that young girl, she is 16 years old. . . .

The Court: Just a moment. The question was, did you know that that was going to damage the property that you were throwing blood on, didn't you know that, the carpet and the pictures and everything else. Didn't you know that would damage the property. That's what he was asking. Now answer the question.

The Witness: Yes, but insignificant damage to the others, the people who were really damaged.

1991 Trans. at 260-61 (emphasis added).

The district judge, during that interrogation, interrupted Father Bourgeois as he was explaining that he did not think about whether or not he was doing damage to the property as he threw the blood, and on-point answer to the prosecutor's question. He then, through belittling interrogation, clearly sided with the prosecution as to the disputed essential element of the crime. The judge's overbearing behavior demonstrated to the jury that he was willing to assist the prosecution without their request, and he held in disdain the defense and Father Bourgeois.

Judge Elliott's most outrageous conduct occurred during the direct examination of Charles Liteky. At the outset of his direct examination, Liteky sought to provide basic background information about himself. When he sought to testify that he was in Vietnam during the Vietnam war, the Court interrupted to say that "all your experiences in Vietnam and all of that, how that may

have affected your life and so on, that has nothing to do with the trial of this case.[21] 1991 Trans. at 210. When Liteky explained that he was trying to establish his background and that his background, in turn, had a lot to do with his state of mind at the time of the alleged criminal activity, the Court irately responded:

The Court: You are the person named in this Indictment, aren't you?

Mr. Charles Liteky: I am, Your Honor.

The Court: All right. That's who you are. Now –

Mr. Charles Liteky: And that's all I am?

The Court: Let's go ahead with the trial of this case.

1991 Trans. at 211.[22]

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[21] Judge Elliott's ruling was erroneous. A defendant-witness has the right to present evidence of specific instances of conduct demonstrating good character. *United States v. Powers*, 622 F.2d 317, 324 n. 10 (8th Cir.), *cert. denied*, 449 U.S. 837 (1980); *United States v. Giese*, 597 F.2d 1170, 1190 (9th Cir.), *cert. denied*, 444 U.S. 979 (1979).

[22] Following this confrontation, Father Bourgeois' attorney made motions for a mistrial and, alternatively, for severance. claiming:

> It's impossible for my client, Father Bourgeois, to get a fair trial when he is joined in a case with a defendant where you are treating the defendant in a very demeaning manner. You are blocking what I would view as admissible testimony and arguing with him and basically telling him that he is nothing other than the name in the indictment. I don't think my client can get a fair trial in a courtroom where the judge is acting

The district judge's action not only had the effect of impermissibly cutting off Liteky's background testimony, his remark that the defendant was nothing more than the person named in the Indictment was unnecessarily demeaning. The judge implied that Liteky's only relevant background experience was that he had been charged with a crime.[23]

In addition to his hostile and demeaning comments toward defendants, the district judge also refused to allow the defendants to testify about the events which impacted their state of mind. Judge Elliott's stubborn refusal to permit the defendants to testify about what occurred in El Salvador is particularly ironic in that he repeatedly permitted the government to introduce evidence and exhibits which explained the defendants' motives for their protest at the School of the Americas. 1991 Trans. at 196, 197, 199, 200. The fact that the judge permitted the government to introduce evidence pertaining to defendants' state of mind, yet repeatedly denied defendants the opportunity to explain that their actions were the product of a righteous fervor, rather than a conscious decision to destroy government property, evidenced one-sidedness and pro-government sentiment.

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that way toward a codefendant who is a close associate and friend of his.
1991 Trans. at 212.

[23] The judge only exacerbated the effect of his prejudicial conduct when, following the discussion with Liteky about his background experience, he referred to Liteky as "Mr. Defendant." 1991 Trans. at 213.

The defendants were charged with violating 18 U.S.C. § 1361, which requires proof the defendants *willfully* injured government property. 18 U.S.C. § 1361 is, therefore, a specific intent crime. *United States v. Jones*, 607 F.2d 269, 273-74 (9th Cir. 1979), *cert. denied*, 444 U.S. 1085 (1980). Because specific intent is an essential element of the crime with which defendants were charged, they should not be deprived of the opportunity to deny that they operated with specific intent, or to offer any possible explanation for their conduct. *United States v. Bowen*, 421 F.2d 193, 197 (4th Cir. 1970). *Cf. Cheek v. United States*, 498 U.S. 192, 204-05 (1992) (evidence of good faith belief in lawfulness of action, even if unreasonable, is relevant to whether act was "willful").

When combined with all of Judge Elliott's similarly improper conduct throughout the 1991 trial, his refusal to permit *mens rea* testimony could reasonably give rise to an appearance of impropriety in the eyes of an objective observer. Indeed, objective trial courts routinely permit criminal defendants to testify fully about their state of mind at the time they engaged in the conduct for which they were later charged. *See, e.g., United States v. Tijerina*, 446 F.2d 675 (10th Cir. 1971); *United States v. Hawk*, 497 F.2d 365 (9th Cir.), *cert. denied*, 419 U.S. 838 (1974); *United States v. Cullen*, 454 F.2d 386 (7th Cir. 1971); *United States v. Malinowski*, 472 F.2d 850 (3rd Cir.), *cert. denied*, 411 U.S. 970 (1973).

3. Judge Elliott's Conduct Following the 1991 Trial Solidifies an Appearance of Impropriety and Risks Undermining the Public's Confidence in the Judicial Process

A district judge's actions post trial are relevant to demonstrate appearance of bias. *Cf. Bland*, 697 F.2d at 266 (post trial actions relevant to fair trial inquiry). In reversing defendant's convictions and remanding for retrial, the *Bland* court recognized that a judge's conduct after sentencing "concededly cannot be deemed prejudicial; however, [it could] indirectly reveal the judge's feelings throughout the trial." *Id.*

At sentencing, an attorney appearing for defendants informed the court that defendants intended to file an appeal. Rather than addressing procedural issues important to the impending appeal, Judge Elliott snapped "he can do whatever he wants to do." 1991 Trans. at 372. Defendants' attorney also indicated that the defendants intended to appeal *in forma pauperis* and certain questions therefore needed to be addressed at that time. The Court, however, refused to address the issue. 1991 Trans. at 372, 379. In fact, Judge Elliott later refused to allow appeal *in forma pauperis* at all, abstrusely finding "no probable cause." Order (June 27, 1991) (Addendum, p. 1-3). The Eleventh Circuit, by Order of November 5, 1991, directly ordered Judge Elliott to permit defendants' appeal to proceed *in forma pauperis*. Order, (Nov. 5, 1991) (Appendix to Pet. for Cert. at A4). Despite this direct order, Judge Elliott refused to sign the CJA-24 form permitting appeal *in forma pauperis*. Letter from Gregory J. Leonard to Miguel J. Cortez (Dec. 9, 1991) (Addendum, p. 4). Judge Elliott's actions following defendants' convictions reflect

the extent to which his strongly held opinions against the defendants have festered since the 1983 trial. In this respect, Judge Elliott's conduct bears a startling resemblance to his behavior in *Clark*, 990 F.2d at 1229. In that case, the Eleventh Circuit exercised its inherent authority and disqualified Judge Elliott from any involvement in future proceedings because it felt that he "would have difficulty putting his previous views and findings aside." *Id.* at 1230.

Judge Elliott's conduct at the 1983 trial, the 1991 trial and during the events subsequent to the 1991 trial all give rise to a question as to his impartiality in this matter. As such, defendants' convictions should be reversed and their case remanded for a new trial before an impartial judge.

CONCLUSION

For the foregoing reasons, petitioners respectfully request that this Court reverse their convictions and remand their case for retrial before an impartial judge or, in the alternative, reverse their convictions and remand this case to the Eleventh Circuit for a determination as to whether Judge Elliott should have recused himself under 28 U.S.C. § 455(a) for judicially acquired appearance of bias.

Respectfully submitted,

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(Appointed by this Court)
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IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF GEORGIA
COLUMBUS DIVISION

UNITED STATES OF AMERICA	*	
	*	CRIMINAL NO.
vs.	*	91-93-COL
JOHN PATRICK LITEKY,	*	
	*	
Defendant	*	

ORDER

Determining that there is not probable cause for appeal in the case above identified, the Court declines to authorize appeal in forma pauperis.

IT IS SO ORDERED, this 27th day of June, 1991.

/s/ J. Robert Elliott
UNITED STATES
DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF GEORGIA
COLUMBUS DIVISION

UNITED STATES OF AMERICA	*	
vs.	*	CRIMINAL NO.
ROY LAWRENCE BOURGEOIS,	*	91-93-COL
Defendant	*	
	*	

ORDER

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/s/ J. Robert Elliott
UNITED STATES
DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF GEORGIA
COLUMBUS DIVISION

UNITED STATES OF AMERICA	*	
vs.	*	CRIMINAL NO.
CHARLES JOSEPH LITEKY,	*	91-93-COL
Defendant	*	
	*	

ORDER

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IT IS SO ORDERED, this 27th day of June, 1991.

/s/ J. Robert Elliott
UNITED STATES
DISTRICT JUDGE

UNITED STATES DISTRICT COURT
Office of the Clerk
Middle District of Georgia
P. O. Box 124
Columbus, Georgia 31902

December 9, 1991

Miguel J. Cortez, Clerk
United States Court of Appeals
Eleventh Circuit
56 Forsyth Street, N.W.
Atlanta, GA 30303

Re: USA v. Liteky
USCA Division No. 91-8577
USDC Docket No. 91-91-CR-COL

ATTENTION: WENDI MASON

Dear Wendi:

Enclosed please find a CJA 24 form sent to this office by the attorney for the Defendant in the above-captioned case. Mr. Thompson has requested that we have Judge Elliott sign same approving payment for a transcript.

Due to the fact that Judge Elliott has denied IFP status for the appeal, he has given me instructions that he will not sign the CJA-24 authorizing payment. Since the Eleventh Circuit authorized the appeal IFP and not Judge Elliott, it should be submitted to the Circuit Court for their consideration.

Should you have any questions concerning this matter, please do not hesitate to contact me.

Very truly yours,
GREGORY J. LEONARD, CLERK

BY: /s/ Carolyn H. Fryer
Carolyn H. Fryer
Deputy Clerk

/chf
Enclosures

cc: Paul Alexander
✔ Peter Thompson
Pete Peterman
Gregory J. Leonard, Clerk, USDC

No. 92-6921

In the Supreme Court of the United States

OCTOBER TERM, 1993

JOHN PATRICK LITEKY, CHARLES JOSEPH LITEKY, AND ROY LAWRENCE BOURGEOIS, PETITIONERS

v.

UNITED STATES OF AMERICA

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES

DREW S. DAYS, III
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JOHN C. KEENEY
Acting Assistant Attorney General

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Deputy Solicitor General

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59 pp

QUESTION PRESENTED

Whether the district judge abused his discretion by refusing to recuse himself under 28 U.S.C. 455(a), which requires recusal when a judge's "impartiality might reasonably be questioned."

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In the Supreme Court of the United States

OCTOBER TERM, 1993

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JOHN PATRICK LITEKY, CHARLES JOSEPH LITEKY, AND ROY LAWRENCE BOURGEOIS, PETITIONERS

v.

UNITED STATES OF AMERICA

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES

OPINION BELOW

The opinion of the court of appeals (J.A. 23-24) is reported at 973 F.2d 910.

JURISDICTION

The judgment of the court of appeals was entered on September 28, 1992. The petition for a writ of certiorari was filed on December 14, 1992, and was granted on May 24, 1993. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATUTORY PROVISIONS INVOLVED

The pertinent provisions of 28 U.S.C. 144 and 455 (1970 & 1988) are reproduced at App., *infra*, 1a-3a.

STATEMENT

After a jury trial in the United States District Court for the Middle District of Georgia, petitioners were convicted of willfully injuring property of the United States, in violation of 18 U.S.C. 1361. Petitioner Bourgeois was sentenced to 16 months' imprisonment, to be followed by a two-year period of supervised release. Petitioners Charles and John Liteky were sentenced to six months' imprisonment. In addition, each petitioner was ordered to make restitution to the United States in the amount of $636.47. The court of appeals affirmed.

1. The evidence at trial showed that, on November 16, 1990, petitioners spilled human blood on carpets, display cases, and interior and exterior walls of a building located on the Fort Benning Military Reservation. Petitioners left leaflets and a letter bearing their signatures at the site. Those documents explained that they took that action to protest the murders of Jesuit priests in El Salvador a year earlier. J.A. 23; 1991 Tr. 97-101, 123-125, 138-140, 172-173, 184-191, 198-200, 215-217, 219-222.[1]

2. Prior to trial, petitioners moved to recuse the district judge pursuant to 28 U.S.C. 455(a), which requires the disqualification of a judge "in any proceeding in which his impartiality might reasonably be questioned." The motion was premised primarily on the fact that, in 1983, the same district judge had presided over a bench trial that resulted in the conviction of petitioner Bourgeois for several offenses, including assault, arising out of an earlier protest at Fort Benning.[2] Mem. in Support of Motion to Recuse (Mem.) at 2.

[1] "1991 Tr." refers to the transcript of petitioners' jury trial in this case. "1983 Tr." refers to the transcript of petitioner Bourgeois's previous bench trial held on September 14, 1983, in the United States District Court for the Middle District of Georgia.

In support of their motion to recuse, petitioners alleged that the judge displayed "impatience, disregard for the defense and animosity toward Father Bourgeois and his beliefs, as well as his similarly situated co-defendants," at the 1983 trial.[3] Mem. at 6. In particular, petitioners pointed (Mem. at 6-11) to the length of the sentence received by petitioner Bourgeois (18 months), the fact that the judge imposed sentence without the benefit of a presentence report, and the following actions taken by the judge during the 1983 trial:

a. At the outset of the trial, the judge stated that "[t]his is a judicial forum. This is not a political forum. We are here for the purpose of trying this criminal case. I just want to be sure that we all understand that." 1983 Tr. 10.

b. After petitioner Bourgeois gave an opening statement condemning the training of Salvadoran troops at Fort Benning,[4] the judge observed: "Of

[2] In the 1983 prosecution, petitioner Bourgeois was convicted on three counts of reentering a military base after having been removed from it, in violation of 18 U.S.C. 1382; two counts of illegally wearing an Army uniform, in violation of 18 U.S.C. 702; and one count of assault, in violation of 18 U.S.C. 113(d). See 1983 Tr. 163-166.

[3] Petitioners Charles and John Liteky were not defendants in the earlier trial.

[4] Petitioner Bourgeois's opening statement read as follows:

> My statement is short, Your Honor, less than two minutes.

[Continued]

course, the statement was supposed to be about what you expected to show upon the trial of the case in the way of evidence." 1983 Tr. 15.

c. During cross-examination of the individual who had been assaulted by petitioner Bourgeois in the 1983 incident, defense counsel elicited testimony to the effect that Bourgeois had been playing a tape-recorded message in Spanish during his incursion into Fort Benning. 1983 Tr. 99-100. Defense counsel then asked, "How did that message affect you, or did it affect you? Did it make you angry?" The judge

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[4] [Continued]

> I stand before this Court today as a priest of the Maryknoll Order trying to take seriously my faith in a loving and caring God, who is the source of all life. I have come to believe that all life is sacred. And since it's sacred, I must respect it, protect it, nurture it. If I see a situation that is doing violence or harm to another human being, I have a responsibility to do all in my power to stop it.
>
> Such a situation exists today at Fort Benning, where Salvadoran soldiers are being trained by my country to kill innocent men, women and children who are struggling for food and for justice. This is a crime against humanity, and it is a crime against God. God tells us clearly, "Thou Shall Not Kill." When a law of my country contradicts the law of my God, then I have no choice but to disobey the law of my country. Some call it civil disobedience; I call it divine obedience.
>
> If this is a crime, then I gladly go to jail for my faith. And I go in solidarity with Archbishop Oscar Romero, twelve priests, Sister Marla Clark and Sister Eta Ford of my Maryknoll Community, who were killed in El Salvador, and the many others who gave their lives for the poor and the oppressed of El Salvador.
>
> Now into my thirty-third day of a fast, I will continue to sustain myself only on liquids * * * until all the Salvadorans leave * * * Fort Benning.

1983 Tr. 14-15.

interrupted at that point, asking, "What's that got to do with this case, how it affected him or how it affected * * * anybody else. What we're talking about now is count three, where it's alleged that on August 9 that the three defendants were found within Fort Benning Military Reservation after having been removed by the Military Police Officer." *Id.* at 100. Defense counsel then asserted that the question was relevant to a separate count charging petitioner Bourgeois with assaulting the witness, and the judge replied: "Ask him about that then. Ask him about that. All this what was on the message and all that, I don't see that that helps us. Go ahead." *Ibid.*

d. During cross-examination of the same witness at the 1983 trial, defense counsel asked where petitioner Bourgeois had "touch[ed]" the witness.[5] 1983 Tr. 109. The judge then intervened: "Well, you say touched. Did he strike you on the right side of the face?" The witness replied, "Yes, sir, like this," apparently demonstrating how he had been struck. *Ibid.* The judge then asked, "[w]ith his right fist?" *Ibid.* The witness answered in the affirmative. *Ibid.* On direct examination, the witness had testified that petitioner Bourgeois hit him with his "right hand open." *Id.* at 96.

e. During direct examination of petitioner Bourgeois, defense counsel questioned him in detail about his personal background, including his profession, his education, his past military experience, and so forth.

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[5] The witness had previously testified that petitioner Bourgeois "hit" him. 1983 Tr. 96, 101, 102, 109.

1983 Tr. 140-141.[6] The district judge then addressed defense counsel as follows: "Let's get right down to the trial of this case now, Mr. Anderson. All this history like that doesn't really have anything to do with what we're here about. He's here charged with having committed these offenses. Now, let's get down to the trial of the case." *Id.* at 142.

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[6] BY MR. ANDERSON:

Q Would you state your name, please, sir?
A Roy Bourgeois.
Q How old are you, Mr. Bourgeois?
A Forty-four.
Q Forty-four?
A Yes.
Q How are you employed, Mr. Bourgeois?
A I'm a priest with the missionary order of the Maryknoll Fathers headquartered in New York.
Q Speak up, please.
A I'm a Catholic priest with the Maryknoll Order, a missionary order headquartered in New York.
Q And when were you ordained as a priest?
A 1972.
Q What did you do prior to 1972, please, sir?
A Prior to '72 I graduated—was in college, graduated and then went into the Navy for four years.
Q And how long were you in the Navy?
A I was a naval officer for four years.
Q During what period of time?
A '62 to '66.
Q What type of discharge did you receive, please, sir?
A I received an honorable discharge as a lieutenant in the U.S. Navy.
Q During your service did you receive any decorations or commendations?
A I was awarded the Purple Heart while in Vietnam.
Q I take it you were wounded in Vietnam?
A Right.

[Continued]

f. On direct examination, in response to the question "[d]id you strike [the assault victim]," petitioner Bourgeois denied committing the charged assault. He then continued to speak, stating that he and his co-defendants "went [to] Fort Benning in the name of peace, in the name of nonviolence. We went there to condemn the violence that's going on there, arming and training of Salvadorans who are slaughtering innocent people. We went there to condemn the situation. And all I can say is I deny that charge, I did not touch him, I did not lay a hand on him, nor would I think of doing that. I went there in the name of peace, went there to condemn the violence that's taking place." 1983 Tr. 142. At that point, the judge interrupted, stating, "Just a moment, just a moment. Don't just repeat all that business that you've just said. Just answer his questions about whether you struck him or not and so on.

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[6] [Continued]

Q When was this, please?
A In 1966.
Q And from 1966 until you were ordained as a priest, please, sir, what did you do for a living?
A Well, having been influenced by my travels in the Navy, most of that time overseas but especially that year in Vietnam, being exposed to poverty there, violence expressed in that war being influenced by refugees and orphans, the victims of the war, and by a missionary priest that I was working with there near the base trying to look after orphans, I decided after leaving the Navy to—after that year in Vietnam to join a missionary group, the Maryknoll Order, hoping that somehow I could contribute to trying to heal some of the suffering and some of the violence that is so alive in our world today.
Q So you attended seminary from '66 until '72?
A Right. In '72 I was ordained.
Q Since 1972 you have worked with the Maryknoll Order—

1983 Tr. 140-141.

Don't make a speech in response to his questions. Just answer his factual questions." *Id.* at 142-143.

g. After completing his cross-examination of petitioner Bourgeois, the prosecutor stated, "All right. That's all we have." 1983 Tr. 147. Petitioner Bourgeois then asked, "Can I say something else?" The judge denied the request, explaining: "you asked can you say something else. Only in response to a question, and there were no more questions." *Ibid.*

h. After all the evidence had been submitted, the district judge granted petitioner Bourgeois's request to give his own closing argument. 1983 Tr. 150-151. Bourgeois then began a lengthy explanation of the underlying reasons for his opposition to the government's policy in El Salvador and his willingness to engage in civil disobedience to protest that policy.[7]

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[7] Petitioner's closing argument was as follows:

> The question I would like to ask you, Your Honor, everyone here, prosecutor, also those on behalf of the battalion from Fort Benning out there, the question is what would we do if we knew that there were at least one or more persons being trained to use an M-16 and other weapons, and after going through a training program they would return to our homes and do harm and kill our loved ones, our friends? What would we do? That's the question I asked when I was in New Orleans doing peace education. That's the question I asked in reference to the Salvadorans being here because I think that's the issue here before us today.
>
> These troops are being trained and after their training will return to their country to kill. It's a crime against humanity, as I said in my opening remark. It's a crime against God. I've been accused—because first of all it might be a little difficult for some people to understand why I and my companions would go back time and time again. But if we really believed that was my brother and sister out there in El Salvador who was going to be killed by these people being trained, could I just sit back and do it once? Could my only response be a letter to my Congressperson? I don't think so. It would require everything in our power to try and protect our loved ones.
>
> Much of the way I feel about this is because of my time spent in Viet—in El Salvador. Vietnam true, it's another Vietnam. Having worked as a missionary in Bolivia for five years but spent a couple of times there in El Salvador and having had two close friends, the Maryknoll Sisters, raped and killed there by the military forces of El Salvador, the situation there has become very, very close to me.
>
> While in El Salvador I was asked by a woman—as I listened to her, she was weeping. "Como es possible, Padre?" "How is it possible," she asked, "that your government, the United States, could be sending advisors and military aid and training our soldiers in your country to return and kill us?" You see, her husband, two sons and her daughter were killed by the military forces of El Salvador. I wept with her, and I said, "No saldamo, Senora." "We don't know what's going on in your country."
>
> But having been in El Salvador, as so many of us now are returning as missionaries, we come back with the message of what's going on there. And the message is clear. The message is genocide. The message is slaughter of our brothers and sisters, who are struggling—

1983 Tr. 151-152.

Id. at 151-152. The judge then interrupted him to point out that he was "just making a speech," that the courtroom was not a "political forum," and that he was "supposed to be talking about the evidence in the case. All these things you're saying to me are political questions." *Id.* at 153. The judge went on to say, however, that "while I have not stopped you except to remind you of this, I do suggest to you that it's simply not an appropriate argument. Now, you can go ahead and finish what it is you want to say." *Ibid.*

i. The judge also permitted petitioner Bourgeois's co-defendants to give their own closing arguments. 1983 Tr. 155-156, 157. During one of those closing arguments, Bourgeois's co-defendant, who had not testified during the trial, began discussing what he had observed at Fort Benning on the night of the offense. *Id.* at 158-159. Interrupting him, the judge explained that "[w]hat you're doing now is you're trying to testify without being under oath. And all you're supposed to be doing now is making a closing argument based upon the evidence that's been presented." *Id.* at 159. The judge then stated: "All right. Go ahead and complete your statement," at which point the defendant immediately concluded his argument. *Id.* at 160.

3. The district court denied the motion to recuse. J.A. 4-5. The court found that most of petitioners' allegations of bias arose out of "matters occurring during the course of" the 1983 trial, and held that "[m]atters arising out of the course of judicial proceedings are not a proper basis for recusal." J.A. 4. The court further found that "[a]ll other factual allegations contained in the motion to recuse and its supporting documents are conclusory in nature" and "are not of such nature that an objective, disinterested lay observer would entertain a significant doubt about this Court's impartiality based thereon." J.A. 5.

4. At the outset of the 1991 trial, petitioner Bourgeois's counsel informed the district judge that he and petitioners John and Charles Liteky intended to focus their defense on the motivations for petitioners' conduct at Fort Benning. 1991 Tr. 50. In reply, the judge ruled:

> I don't mind letting you say in an opening statement and letting [petitioners] say if they want to when they testify that they were doing this to protest government involvement in El Salvador. * * * But I'm certainly not going to let them make a long speech and discussion about government policy and about what may have happened in El Savador or what didn't happen. * * *
>
> In other words, if you will just confine it * * * to what you said, that they were doing this to protest government involvement in El Salvador, which they thought was wrong, and then just stop there, I don't mind you saying that. * * *
>
> But if you try to take it further and talk in your opening statement or if they try to talk in their testimony * * * about the things that they say happened in El Salvador which they think are wrong * * *, I'm not going to let you go into all of that. That's not what we're here for. Talk to Congress about that.

Id. at 53-54.

During his opening argument at the 1991 trial, petitioner Bourgeois's counsel stated that the blood used by petitioners in committing their offense contained "remnants of the human blood of martyrs who had been killed a year before in El Salvador. A year before exactly on that date, November 16, 1989, eight people were killed in El Salvador." 1991 Tr. 91. As counsel was beginning to explain the circumstances of those killings, the prosecutor objected, and the judge ruled as follows (*id.* at 91-92):

> Here we go again now. I wish you'd just confine your remarks to—you know what you're supposed to do in an opening statement. And

just tell the jury what you expect the evidence to show here.

Now you've already said that your client did this because of some feeling he had about El Salvador, but then stop right there. I'm not going to let you introduce evidence about anything that may have happened in El Salvador. It doesn't have anything to do with whether these defendants did what they're charged with doing.

It may have something to do with some idea that they had in their minds about that they wanted to get even with somebody about something or correct something in El Salvador, but that's not what this jury is interested in. Just confine your remarks to what you expect the evidence to show.

At the close of the government's case, counsel for petitioner Bourgeois renewed the earlier motion to recuse the district judge. 1991 Tr. 201-203.[8] In support of that motion, counsel made specific reference only to the above remarks made by the judge during counsel's opening argument and to the admission of certain evidence demonstrating petitioners' motive. *Id.* at 201-202. Counsel also asserted that the court had erred in ruling that matters arising in the course of judicial proceedings could not give rise to recusal under 28 U.S.C. 455. 1991 Tr. 202-203. The court denied the motion. *Id.* at 203.

5. On appeal, petitioners renewed their recusal claim. The court of appeals held that "matters arising out of the course of judicial proceedings are not a proper basis for recusal." J.A. 23-24. Accordingly, the court concluded that the district court properly denied petitioners' motions to recuse. *Id.* at 24. In addition, after "carefully reviewing [petitioners'] arguments as well as the record on appeal," the court of appeals rejected petitioners' contention that the district court denied them a fair trial.

[8] Petitioners John and Charles Liteky did not join in that renewed motion.

SUMMARY OF ARGUMENT

I. Before 1974, federal law provided two distinct statutory grounds for recusal: 28 U.S.C. 144 (1970) required recusal for bias or prejudice, and 28 U.S.C. 455 (1970) required recusal for interest. Courts applying Section 144 had long held that allegations of bias were legally insufficient unless the alleged bias derived from an extrajudicial source.

Congress amended Section 455 in 1974, but there is no indication that the 1974 Act was intended to abrogate the extrajudicial-source requirement. The relevant provision of the amended statute, Section 455 (a), requires disqualification when a judge's "impartiality may reasonably be questioned." That provision was intended to impose an objective test, in place of the subjective test of prior law, in cases of recusal for interest. In addition, that provision was intended to eliminate the "duty to sit" of prior law, pursuant to which judges were obligated to resolve any doubts under Section 455 in favor of non-recusal. With respect to recusal for bias or prejudice, the statute's use of a "reasonableness" standard suggests congressional intent to preserve traditional principles of judicial disqualification, consistent with an objective standard of impartiality. Because information coming to a judge in his judicial capacity is not ordinarily deemed sufficient to give rise to bias or prejudice, the extrajudicial-source requirement is one of the principles that was preserved as consistent with the objective "reasonableness" test adopted by Section 455(a).

Nothing in the legislative history of Section 455 suggests that Congress intended the 1974 Act to do away with the extrajudicial-source requirement. To the contrary, the relevant portions of the legislative hearings on the Act demonstrate that subsection (a) of amended Section 455 was intended to preserve the longstanding rule that judges could not be disqualified on the basis of alleged bias derived from a judicial source. Leading experts in the field of judicial disqualification indicated that subsection (a) would not dramatically rewrite the law of recusal for bias or prejudice, and there is every reason to believe that Congress accepted those statements at face value.

II. Regardless of the continued vitality of the extrajudicial-source requirement, there is no justification for concluding that a judge's adverse rulings may serve as a proper basis for recusal under Section 455(a). Recusal is required under that provision only when a judge's impartiality may "reasonably" be questioned, and it is simply not reasonable to infer partiality from the fact that a judge has ruled against a party, even if the judge's rulings are erroneous.

There would be no limit to recusal motions if adverse rulings alone could satisfy the requirements of Section 455(a). The result would be to encourage litigants to engage in "judge shopping" in the hopes of obtaining a judge who would look more favorably on the merits of their cases. Moreover, permitting motions to recuse to be based on adverse rulings would risk compromising judicial independence, as judges tried to balance their adverse rulings in order to avoid any "appearance" of favoring one side or the other.

Construing Section 455(a) to achieve this result would also impose enormous burdens on the district courts and courts of appeals, which could at the whim of any party be required to revisit the merits of countless rulings at any point in the proceedings. Those burdens would not be accompanied by any benefits to the judicial system in terms of fairness or accuracy, because the appellate process already provides an adequate avenue for correcting legal error.

It has always been the law that a judge's adverse rulings do not constitute a proper basis for a motion to recuse. That rule is not dependent on the continued validity of the extrajudicial-source requirement; to the contrary, every court that has addressed the question, including those courts that have rejected the extrajudicial-source requirement under Section 455(a), has concluded that adverse rulings cannot, except perhaps in the most extreme cases, suffice to require recusal under Section 455(a).

The legislative history of the 1974 Act demonstrates that Congress did not intend to authorize motions to recuse based on adverse judicial rulings. To the contrary, the committee reports on the 1974 Act expressly caution judges against recusing themselves on such grounds, and accordingly the conclusion is inescapable that Congress intended to preserve the existing law in this area.

III. The allegations of bias relied upon by petitioners in their motions to recuse the district judge involved either actual rulings by the district judge or the judge's statements of his understanding of the requirements of the law and the propriety of particular evidence, arguments, or procedures. Those

allegations are therefore insufficient to require recusal.

Even if adverse judicial rulings were a proper basis for motions to recuse, the grounds cited by petitioners in their motions would not justify recusal. Most of the challenged rulings involve plainly legitimate efforts by the judge to keep the trial moving and foreclose the defense strategy of turning the courtroom into a political forum. The cited instances of the judge's examination of witnesses were entirely proper and thus not indicative of bias. The sentence imposed on petitioner Bourgeois after the 1983 trial was not unduly harsh under the circumstances, and the judge's failure to call for a presentence report before imposing sentence was neither unusual nor suggestive of prejudice. Accordingly, petitioners' motions for recusal were properly denied.

ARGUMENT

Petitioners' recusal motions were based on the district judge's rulings and actions in conducting the 1983 and 1991 trials. In denying relief, the courts below invoked the longstanding rule that a charge of bias cannot lead to disqualification unless the alleged bias has an extrajudicial source. Most courts of appeals have concluded that the extrajudicial-source rule continues to govern cases arising under 28 U.S.C. 455(a), and we submit that this Court should reach the same conclusion.

Even if petitioners are correct in asserting that Section 455(a) dispenses with the extrajudicial-source requirement, the courts below still reached the correct result in this case. Petitioners' recusal motions were properly rejected under any reading of Section 455(a), because that statute requires recusal

only when a judge's impartiality might "reasonably" be questioned. 28 U.S.C. 455(a). As a matter of law, it is not reasonable to question a judge's impartiality based on his adverse rulings in judicial proceedings.

I. WHEN CONGRESS REVISED SECTION 455 IN 1974, IT DID NOT ELIMINATE THE LONGSTANDING REQUIREMENT THAT BIAS MUST HAVE AN EXTRAJUDICIAL SOURCE IN ORDER TO REQUIRE RECUSAL

Prior to the amendment of Section 455 in 1974, federal law provided two routes by which litigants could seek recusal or disqualification of federal judges. Disqualification for bias or prejudice was governed by 28 U.S.C. 144 (1970); disqualification for conflict of interest—financial or otherwise—was governed by 28 U.S.C. 455 (1970). See App., *infra*, 1a, 3a.

Under Section 144, it has long been established that "[t]he alleged bias and prejudice to be disqualifying must stem from an extrajudicial source and result in an opinion on the merits on some basis other than what the judge learned from his participation in the case." *United States* v. *Grinnell Corp.*, 384 U.S. 563, 583 (1966).[9] The extrajudicial-source re-

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[9] See, *e.g.*, *Berger* v. *United States*, 255 U.S. 22, 34 (1921); *Ex parte American Steel Barrel Co.*, 230 U.S. 35, 43-44 (1913); *Tynan* v. *United States*, 376 F.2d 761, 764-765 (D.C. Cir.), cert. denied, 389 U.S. 845 (1967); *In re Union Leader Corp.*, 292 F.2d 381, 388-389 (1st Cir.), cert. denied, 368 U.S. 927 (1961); *Wolfson* v. *Palmieri*, 396 F.2d 121, 124 (2d Cir. 1968) (per curiam); *United States* v. *Thompson*, 483 F.2d 527, 529 (3d Cir. 1973); *Knapp* v. *Kinsey*, 232 F.2d 458, 466 (6th Cir.), cert. denied, 352 U.S. 892 (1956); *Barkan* v. *United States*, 362 F.2d 158, 160 (7th Cir.), cert. denied, 385 U.S. 882 (1966); *United States* v. *Beneke*, 449 F.2d 1259,

quirement has the effect of significantly limiting the types of allegations of bias that can lead to recusal, because except in extreme cases nothing that the judge does or says as a result of information learned or events occurring during the course of judicial proceedings can provide a basis for disqualification.[10]

1260-1261 (8th Cir. 1971); *Ferrari* v. *United States*, 169 F.2d 353, 355 (9th Cir. 1948).

[10] Of course, the extrajudicial-source requirement has not been understood to preclude all consideration of a judge's in-court conduct in determining whether recusal is required. The rule that bias must have an extrajudicial source in order to be disqualifying focuses on the *source* of the bias, not the forum in which it is expressed, and thus recusal has always been required when the judge's comments during the course of judicial proceedings demonstrate bias derived from an extrajudicial source rather than merely from the judge's participation in the proceedings. See, *e.g.*, *Berger* v. *United States*, 255 U.S. at 34; *In re International Business Machines Corp.*, 618 F.2d 923, 928 n.6 (2d Cir. 1980) ("conduct in the course of a trial might be relevant to indicate a bias that can only be explained as a personal prejudice against a party"); see generally 13A C. Wright, A. Miller & E. Cooper, *Federal Practice and Procedure* § 3542, at 573-575 & n.23 (2d ed. 1984). Other courts have framed this principle in slightly different terms, stating that there is an exception to the extrajudicial-source requirement when the judge's in-court conduct demonstrates the existence of "pervasive bias." *Davis* v. *Board of School Commissioners*, 517 F.2d 1044, 1051 (5th Cir. 1975), cert. denied, 425 U.S. 944 (1976); *United States* v. *Porter*, 701 F.2d 1158, 1166 (6th Cir.), cert. denied, 464 U.S. 1007 (1983); *United States* v. *Monaco*, 852 F.2d 1143, 1147 (9th Cir. 1988), cert. denied, 488 U.S. 1040 (1989); *McWhorter* v. *City of Birmingham*, 906 F.2d 674, 678 (11th Cir. 1990) (per curiam); cf. *Rice* v. *McKenzie*, 581 F.2d 1114, 1118 (4th Cir. 1978) ("The principle that the source of the bias or partiality must be extra-judicial * * * has always had limitations.").

In 1974, Congress substantially revised Section 455. See Act of Dec. 5, 1974, Pub. L. No. 93-512, 88 Stat. 1609. The stated purpose of the 1974 Act was to "clarify and broaden the grounds for judicial disqualification" and to render the federal recusal statutes more consistent with the judicial-disqualification provisions of the recently adopted ABA Code of Judicial Conduct. *Liljeberg* v. *Health Services Acquisition Corp.*, 486 U.S. 847, 858 n.7 (1988); see H.R. Rep. No. 1453, 93d Cong., 2d Sess. 1-2 (1974); S. Rep. No. 419, 93d Cong., 1st Sess. 1 (1973). A careful reading of amended Section 455 and its legislative history suggests, however, that Congress did not intend the 1974 Act to eliminate the extrajudicial-source requirement and thereby dramatically alter the law of recusal for bias or prejudice.

1. Revised Section 455 differs from the previous version of the statute in several respects. For example, the revised statute requires judges to recuse themselves when they have *any* financial interest in a case, "however small"; under prior law, recusal was required only if the judge's interest was "substantial."[11] See H.R. Rep. No. 1453, *supra*, at 7; S. Rep.

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[11] Under the previous version of Section 455, a federal judge was required to recuse himself "in any case in which he has a substantial interest, has been of counsel, is or has been a material witness, or is so related to or connected with any party or his attorney as to render it improper, in his opinion, for him to sit." 28 U.S.C. 455 (1970); App., *infra*, 3a. The revised version of Section 455 requires recusal where the judge, "or his spouse or minor child residing in his household, has a financial interest in the subject matter in controversy or in a party to the proceeding." 28 U.S.C. 455(b)(4); App., *infra*, 1a-2a. The statute defines "financial interests" to mean, with certain narrow exceptions, "ownership of a legal or

No. 419, *supra*, at 6. In addition, subsection (b)(1) of the revised statute expressly addresses the subject of disqualification for bias or prejudice; prior to 1974, Section 455 applied only to disqualification for actual or apparent "interest," such as a financial interest in the outcome or some other personal connection to the case. See 28 U.S.C. 455 (1970); *United States* v. *Wolfson*, 558 F.2d 59, 62 (2d Cir. 1977). Most saliently for purposes of this case, subsection (a) of the revised statute provides that a judge must "disqualify himself in any proceeding in which his impartiality might reasonably be questioned"; the prior version of Section 455 did not include language to that effect.

The text of Section 455 does not define or otherwise explain the meaning of the phrase "impartiality might reasonably be questioned." Instead, by simply invoking the concept of reasonableness, the statute leaves to the courts the task of determining what circumstances may be said to raise reasonable questions regarding the court's impartiality. The statute thus in effect calls for the development of a common law of recusal. To obtain guidance as to the principles that should be employed in shaping that common law, it is necessary to look to the legislative history of the statute and the traditional rules of judicial disqualification.

2. The legislative history of the 1974 Act makes clear that new subsection (a) was intended to work two changes in the prior law regarding recusals for interest. First, the phrase "impartiality might reasonably be questioned" was intended to impose an

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equitable interest, however small." 28 U.S.C. 455(d)(4); App., *infra*, 3a.

objective standard in place of the subjective "in [the judge's] opinion" test that was applicable to claims of conflict of interest under the previous version of Section 455. See H.R. Rep. No. 1453, *supra*, at 5 ("This sets up an objective standard, rather than the subjective standard set forth in the existing statute through use of the phrase 'in his opinion'."); S. Rep. No. 419, *supra*, at 5 (same); see also *Liljeberg* v. *Health Services Acquisition Corp.*, 486 U.S. at 858 n.7; *United States* v. *Haldeman*, 559 F.2d 31, 139 & n.359 (D.C. Cir. 1976) (en banc, per curiam), cert. denied, 431 U.S. 933 (1977). Second, subsection (a) was intended to "remov[e] the so-called 'duty to sit' which ha[d] become a gloss on the existing statute." H.R. Rep. No. 1453, *supra*, at 5; S. Rep. No. 419, *supra*, at 5. The "duty to sit" obligated judges faced with claims of "interest" under Section 455 to resolve any doubts in favor of nonrecusal, see, *e.g.*, *Laird* v. *Tatum*, 409 U.S. 824, 837 (1972) (Rehnquist, J., in chambers); subsection (a) eliminated that duty.

The concerns expressed in the committee reports focused on these two aspects of the law governing judicial disqualifications for interest under the prior version of Section 455. Absent from the reports, however, is any indication that subsection (a) was intended or expected to alter in any substantial way the law applicable to recusal for bias or prejudice in general, and the extrajudicial-source requirement in particular.

The sparse legislative debate on S. 1064, the bill that was enacted as amended Section 455, also provides no hint of any congressional expectation that the inclusion of subsection (a) in the revised statute would eliminate the extrajudicial-source requirement

that had traditionally governed claims of recusal for bias. Senator Burdick, the principal sponsor of S. 1064, did not mention subsection (a) in his remarks on the floor of the Senate, and he characterized the separate requirement that judges recuse themselves based on any financial interest, "however small," as "[t]he most significant provision in these new standards." 119 Cong. Rec. 33,029 (1973). Similarly, Representative Kastenmeier, the chairman of the House subcommittee that considered S. 1064, characterized the change in the financial-interest standard as one of the "two principal differences between present section 455 and section 455 as proposed by S. 1064"; the other "principal" change in the law, according to Representative Kastenmeier, was the elimination of the "duty to sit," a result achieved "by requiring a judge to disqualify himself in any proceeding in which his impartiality might reasonably be questioned." 120 Cong. Rec. 36,268 (1974). Nothing said during the debate on the bill provides any indication that Congress intended or expected subsection (a) to have the further, dramatic effect of eliminating the extrajudicial-source requirement for claims of bias or prejudice.

The legislative hearings that led to the adoption of the 1974 Act provide additional evidence that Congress did not intend subsection (a) to work such a significant change in the law of recusal for bias or prejudice. The principal witness at those hearings was John P. Frank, an expert in the field of judicial ethics who worked closely with the Senate subcommittee that reported S. 1064.[12] A colloquy between

[12] Mr. Frank assisted Senator Bayh in drafting one of the predecessor bills to S. 1064. *Hearing on S. 1064 Before the Subcomm. on Improvements in Judicial Machinery of the Senate Comm. on the Judiciary*, 93d Cong., 1st Sess. 10 (1973) (statement of Sen. Bayh) ("[T]hese revisions reflect the thoughts and testimony of John Frank, one of our foremost authorities on judicial disqualification, who will be testifying later today. They were drafted and revised with the continuing advice and invaluable assistance of Mr. Frank."); see also *id.* at 60, 116 (statement of Mr. Frank, discussing his work with Senator Bayh and the Senate subcommittee on the 1974 Act); H.R. Rep. No. 1453, *supra*, at 3 (referring to Mr. Frank's support for S. 1064).

Mr. Frank and Representative Kastenmeier at the House subcommittee hearings provides what is perhaps the clearest indication that subsection (a) was not intended to overturn the extrajudicial-source requirement and require a judge to disqualify himself based on allegations of bias arising out of his prior judicial involvement in the same or similar matter:

> Mr. KASTENMEIER. Page 1, line 6, I am wondering what the practical meaning of this is:
>
> > Any justice shall disqualify himself in any proceeding in which his impartiality might reasonably be questioned.
>
> Mr. FRANK. May I address myself to that? As you have said, the committee does not deal with this commonly and therefore you may be unaware that these are terms of art. * * * I want to make loud and clear for purposes of this record, because I assume that this record may have importance for many, many years in the future, that this does not mean that judges are going to be casually getting off the bench or that somebody can march into a judge and say, "Well, I just don't feel comfortable with you. I wish you would go away. I question your impartiality." That is not to happen at all.

> For example, *it has been the fixed practice that a judge may have developed points of view on a matter because he has handled the same matter previously and been involved in it*; something of that sort. To that extent he has made up his mind. *To challenge on that ground is not permitted by this clause at all.* It is meant to cover the kind of thing where, for example, personal relationships are involved.

Hearing on S. 1064 Before the Subcomm. on Courts, Civil Liberties, and the Administration of Justice of the House Comm. on the Judiciary, 93d Cong., 2d Sess. 14-15 (1974) (emphasis added) [hereinafter *House Hearing*]. Mr. Frank's reference to the "fixed practice" of permitting judges to preside over cases even after developing "points of view" arising out of the conduct of judicial proceedings can only be understood as a reference to the extrajudicial-source requirement, which was intended to survive the adoption of subsection (a).

Immediately after Mr. Frank made the above statement, he and Representative Kastenmeier both indicated that the effect of Section 455(a) was to eliminate the "duty to sit" in cases in which the judge's impartiality might reasonably be questioned, while at the same time requiring the judge to sit where the requirements of Section 455 had not been satisfied. *House Hearing*, *supra*, at 15. The following revealing exchange then ensued, with Mr. Frank and former Chief Justice Roger J. Traynor of the California Supreme Court both addressing the committee:

> Mr. FRANK. The judge, unless his impartiality may reasonably be questioned *in terms of common traditions* of what is a reasonable doubt

> does have a duty to sit. *He is required to go back to the books and find out what the traditions and practices have been.* There will be growth and change, of course, as there always will be in the common law, but Chief Justice Traynor, [the chairman of the ABA committee that drafted the Code of Judicial Conduct and another witness before the House subcommittee,] * * * was not telling judges to go off and take vacations just because cases were uncomfortable. That is not what this means. You concur, I believe.
>
> Judge TRAYNOR. Right.

Ibid. (emphasis added). Thus, both Mr. Frank and Chief Justice Traynor assured the House subcommittee that Section 455(a) would not work a dramatic change in the law, but would instead require judges to apply "common traditions * * * and practices" in determining whether to recuse themselves under that provision. In light of those assurances, it is hardly surprising that the committee reports and legislative debates on the 1974 amendment give no hint of any intention to eliminate the extrajudicial-source requirement; no such intention existed.

3. In keeping with the legislative history of the 1974 Act, most courts of appeals that have addressed the question have concluded that claims of recusal arising under Section 455(a), like claims based on Section 455(b)(1) and 28 U.S.C. 144, are subject to the traditional extrajudicial-source requirement.[13]

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[13] See, *e.g.*, *Johnson* v. *Trueblood*, 629 F.2d 287, 290-291 (3d Cir. 1980), cert. denied, 450 U.S. 999 (1981); *United States* v. *Mitchell*, 886 F.2d 667, 671 (4th Cir. 1989); *United States* v. *Merkt*, 794 F.2d 950, 960 (5th Cir. 1986), cert. denied, 480 U.S. 946 (1987); *United States* v. *Sammons*, 918

As those courts have explained, in the absence of any indication that Congress intended to repeal the extrajudicial-source requirement by enacting Section 455(a), the fairest inference is that the requirement continues to govern all claims of recusal for bias.[14]

That conclusion is consistent with the teachings of this Court. "The normal rule of statutory construction is that if Congress intends for legislation to change the interpretation of a judicially created concept, it makes that intent specific." *Midlantic Nat'l Bank* v. *New Jersey Dep't of Environmental Protec-*

F.2d 592, 599 (6th Cir. 1990); *United States* v. *Sibla*, 624 F.2d 864, 869 (9th Cir. 1980); *McWhorter* v. *City of Birmingham*, 906 F.2d at 678; *United States* v. *Barry*, 961 F.2d 260, 263 (D.C. Cir. 1992); cf. *United States* v. *Coven*, 662 F.2d 162, 168-169 (2d Cir. 1981), cert. denied, 456 U.S. 916 (1982) ("under section 455(a) considerations, the fact that [the district judge] came upon the allegedly prejudicial information in her judicial rather than personal capacity, even if not dispositive, is relevant to an analysis of the appearance of impartiality"). Contra *United States* v. *Chantal*, 902 F.2d 1018, 1023-1024 (1st Cir. 1990).

[14] See, *e.g.*, *Johnson* v. *Trueblood*, 629 F.2d at 290-291 ("[I]t seems that § 455(a) was intended only to change the standard the district judge is to apply to his or her conduct; it does not alter the type of bias required for recusal. Thus the rule under § 144 continues that only extrajudicial bias requires disqualification."); *Davis* v. *Board of School Commissioners*, 517 F.2d at 1052 (finding "no suggestion in the legislative history that these decisions [adopting the extrajudicial-source requirement] were being overruled or in anywise eroded"); *United States* v. *Haldeman*, 559 F.2d at 133 n.297 ("Nothing we have observed in the legislative history of new § 455(a) suggests that [the extrajudicial-source requirement] was to be overturned. The Fifth Circuit has concluded that new § 455(a) is to be similarly interpreted. Absent clearer guidance as to the congressional intent, we agree.") (citation omitted).

tion, 474 U.S. 494, 501 (1986); see also *Astoria Fed. Sav. & Loan Ass'n* v. *Solimino*, 111 S. Ct. 2166, 2169-2170 (1991). It is difficult to believe that Congress could have eliminated the extrajudicial-source requirement and thereby worked a fundamental change in the law of recusal for bias without so much as a mention of that change. As this Court noted in a similar context, "[t]he reports and debates leading up to the * * * Amendments contain not a word of this concept. This silence is most eloquent, for such reticence while contemplating an important and controversial change in existing law is unlikely." *Edmonds* v. *Compagnie Generale Transatlantique*, 443 U.S. 256, 266-267 (1979) (footnote omitted).

This Court has already recognized that the 1974 Act ought not be read to abrogate longstanding judicial doctrines that have traditionally governed the law of recusal. In *United States* v. *Will*, 449 U.S. 200 (1980), the Court held that, despite the seemingly all-encompassing and mandatory language of amended Section 455, that statute would not be read to overrule the traditional Rule of Necessity, which provides that recusal is not required when the case could not otherwise be heard by any judge. The *Will* Court explained: "The congressional purpose so clearly expressed in the Reports gives no hint of altering the ancient Rule of Necessity, a doctrine that had not been questioned under prior judicial disqualification statutes." 449 U.S. at 217. By the same token, the congressional purpose gives no hint of altering the extrajudicial-source requirement; accordingly, that requirement should likewise be deemed to survive enactment of the 1974 Act.

4. Petitioners contend (Pet. Br. 13-19) that Section 455(a) had the effect of abrogating the

extrajudicial-source requirement because subsection (a) is a "catch-all" provision that was intended to avoid even the "appearance" of impartiality. While it is true that Section 455(a) broadened the grounds for disqualification in several respects, it did not dispense with all prior principles of recusal law. Instead, as we have noted, the limitation of Section 455(a) to cases in which a judge's impartiality might "reasonably" be questioned indicates that Congress meant to preserve traditional principles of recusal law that are consistent with an objective "appearance" standard. One of those principles is the extrajudicial-source requirement. That requirement is consistent with the "appearance" standard, because it is commonly understood and expected that judges will make judgments and develop points of view about the issues and parties before them as a result of what they learn in the judicial process. An informed, reasonable person would not ordinarily assume that rulings, statements, or other actions by a judge in response to matters occurring in judicial proceedings rendered him biased and justified removing him from further performance of his duties in a particular case. That is precisely what Mr. Frank suggested in his testimony before the House subcommittee considering the 1974 amendment to Section 455, when he noted that subsection (a) is not meant to address alleged bias based on a court's prior handling of a case, but "is meant to cover the kind of thing where, for example, personal relationships are involved." *House Hearing*, *supra*, at 15.

Section 455(a) therefore should not be construed to overturn the longstanding rule that bias or prejudice ordinarily must have an extrajudicial source in order to be disqualifying. Any doubt on that question must be resolved in favor of the retention of settled law; as this Court has made clear, "[a] party contending that legislative action changed settled law has the burden of showing that the legislature intended such a change." *Green* v. *Bock Laundry Machine Co.*, 490 U.S. 504, 521 (1989). Petitioners have not met that burden in this case.

II. EVEN IF THE 1974 ACT ELIMINATED THE EXTRAJUDICIAL-SOURCE REQUIREMENT, ALLEGATIONS OF BIAS OR PREJUDICE BASED ON JUDICIAL RULINGS WOULD BE INSUFFICIENT AS A MATTER OF LAW TO REQUIRE RECUSAL

Regardless of the continued vitality of the extrajudicial-source requirement, petitioners err in assuming (Br. 28-39) that a judge's adverse rulings can provide a sufficient basis for recusal under Section 455(a). The statute requires recusal only when a judge's "impartiality might reasonably be questioned," 28 U.S.C. 455(a). Standing alone, a judge's adverse rulings do not support a reasonable charge of bias.

1. In every trial, judges must make rulings and take steps to manage the proceedings. Most judicial rulings are adverse to one party, and sometimes those rulings are incorrect. Because judges are not infallible, it is unreasonable to assume that incorrect rulings are the result of bias or prejudice. See *United States* v. *Gallagher*, 576 F.2d 1028, 1039 (3d Cir. 1978) ("incorrect rulings do not prove that a judge is biased or prejudiced although errors may require a new trial"). Indeed, it is in recognition of the fact of judicial fallibility that the appellate process was established.

Every ruling on an arguable point creates an opportunity and incentive for one party or the other to

assert an appearance of impartiality. See *Little Rock School Dist.* v. *Pulaski County Special School Dist. No. 1*, 839 F.2d 1296, 1302 (8th Cir.), cert. denied, 488 U.S. 869 (1988) ("Not surprisingly, the parties have generally discovered grounds for disqualification at approximately the same times that the District Court has ruled for their adversaries on the merits."). If Section 455(a) were construed to authorize recusal based on a judge's adverse rulings and case-management decisions, virtually every trial could be subject to repeated interruption for recusal motions, and the denial of those motions could lead to multiple mandamus petitions seeking mid-trial appellate review.[15] Such an approach, moreover, would open the

[15] The courts of appeals have held that mandamus is a proper means for obtaining review of a judge's refusal to recuse himself under Section 455(a). See, *e.g.*, *In re School Asbestos Litigation*, 977 F.2d 764, 774-778 (3d Cir. 1992); *In re Aetna Casualty & Surety Co.*, 919 F.2d 1136, 1143 (6th Cir. 1990) (en banc); *In re United States*, 666 F.2d 690, 694 (1st Cir. 1981); *In re International Business Machines Corp.*, 618 F.2d at 926-927; *SCA Services, Inc.* v. *Morgan*, 557 F.2d 110, 117-118 (7th Cir. 1977) (per curiam). Indeed, the Seventh Circuit has held that the filing of a petition for mandamus is the *only* way by which a litigant may obtain review of the denial of a motion to recuse under Section 455(a). See, *e.g.*, *United States* v. *Masters*, 924 F.2d 1362, 1367 (7th Cir.), certs. denied, 111 S. Ct. 2019 (1991) and 112 S. Ct. 86 (1991); *United States* v. *Troxell*, 887 F.2d 830, 833 (7th Cir. 1989); *New York City Housing Development Corp.* v. *Hart*, 796 F.2d 976, 978-979 (7th Cir. 1986) (per curiam); *United States* v. *Balistrieri*, 779 F.2d 1191, 1204-1205 (7th Cir. 1985), cert. denied, 475 U.S. 1095 (1986). We did not rely on petitioners' failure to seek mandamus as a basis for rejecting their claims either in the court of appeals or in our brief in opposition in this Court, and we therefore take no position on the correctness of the Seventh Circuit's approach for purposes of this case. We note, however, that the Seventh Circuit's rule would inevitably lead to a substantial increase in disruptive petitions for mandamus if this Court holds that motions to recuse under Section 455(a) may be based on adverse rulings by trial judges.

way "to a return to 'judge shopping', a practice which has been for the most part universally condemned." *Haldeman*, 559 F.2d at 133 n.297. The rule that adverse rulings are not a basis for recusal thus serves the "practical purpose of preventing parties from using the claim of partiality as a pretext for judge-shopping or challenging adverse rulings of law or fact which should properly be addressed only through the appellate process." *United States* v. *Conforte*, 457 F. Supp. 641, 657 (D. Nev. 1978), aff'd in pertinent part, 624 F.2d 869 (9th Cir.), cert. denied, 449 U.S. 1012 (1980).

Furthermore, allowing recusal motions to be based on adverse rulings or other judicial actions would have a dangerous tendency to compromise judicial independence. A trial judge "must be free to make rulings on the merits without the apprehension that if he makes a disproportionate number in favor of one litigant, he may have created the impression of bias. Judicial independence cannot be subservient to a statistical study of the calls he has made during the contest." *In re International Business Machines Corp.*, 618 F.2d 923, 929 (2d Cir. 1980). After all, "[i]t is a district judge's duty to conduct trials, weigh evidence, consider the law, exercise his discretion, and reach decisions in the cases on which he sits. If he understands that a seemingly harsh comment toward a party or an attorney, or a perceived tendency to give severe sentences to some class of offenders, or an aggregate imbalance in victories for plaintiffs or defendants in a particular class of cases may

subject him to a train of successful recusal motions in future cases, he may consciously or subconsciously shape his judicial actions in ways unrelated to the merits of the cases before him." *Phillips* v. *Joint Legislative Comm.*, 637 F.2d 1014, 1020 (5th Cir. 1981), cert. denied, 456 U.S. 960 (1982).

Finally, authorizing the routine filing of recusal motions based on a judge's adverse decisions would burden the courts, without providing any significant benefits in return. In order to give plenary consideration to such motions to recuse, district courts (and courts of appeals considering petitions for mandamus) would have to "examine each and every ruling to determine whether it was, initially, legally valid." *In re International Business Machines Corp.*, 618 F.2d at 930. To the extent the challenged rulings were deemed correct, they obviously could not support a motion to recuse; it would hardly be "reasonabl[e]" to infer partiality from a judge's correct and proper rulings. *Ibid.* Even incorrect rulings would not necessarily indicate bias;[16] rather, after determining

[16] It is for that reason that the Due Process Clause, which requires disqualification when necessary to satisfy the "appearance of justice" (see, *e.g.*, *Aetna Life Ins. Co.* v. *Lavoie*, 475 U.S. 813, 825 (1986); *Commonwealth Coatings Corp.* v. *Continental Casualty Co.*, 393 U.S. 145, 148 (1968); *In re Murchison*, 349 U.S. 133, 136 (1955)), has never been construed to preclude sending a case back to a judge whose prior rulings have been reversed as legally erroneous. See, *e.g.*, *Withrow* v. *Larkin*, 421 U.S. 35, 57 (1975) ("it is not contrary to due process to allow judges and administrators who have had their initial decisions reversed on appeal to confront and decide the same questions a second time around"): *FTC* v. *Cement Institute*, 333 U.S. 683, 702-703 (1948) ("[No] decision of this Court would require us to hold that it would be a violation of procedural due process for a judge to sit in a case after he had expressed an opinion as to whether certain types of conduct were prohibited by law. In fact, judges frequently try the same case more than once and decide identical issues each time, although these issues involve questions both of law and fact.").

which of the challenged rulings were erroneous, the court considering the motion to recuse would then "have to ask whether the error could be attributed to the judge's misunderstanding of the facts or the law." *Ibid.* Conceivably, motions to recuse could become a powerful and disruptive litigation tool, enabling parties who dislike a particular judge's rulings to demand reconsideration and, if still dissatisfied, to seek immediate appellate review of those rulings.

All this additional procedure would do little to enhance public confidence in the judicial process or the reliability of judicial results, because the appellate process already provides an avenue for review of allegedly erroneous rulings. See *In re International Business Machines Corp.*, 618 F.2d at 930 ("If material legal or factual error has been committed it can be dealt with on plenary appeal."). As one court of appeals put it, "[i]f a judge's 'error' amounts to incorrect law or an abuse of discretion, appellate courts exist to correct it. Within that boundary, he not only may, but should, exercise his independent judgment on the facts and on the law." *Phillips* v. *Joint Legislative Comm.*, 637 F.2d at 1020.

2. It has always been the law that, absent unusual circumstances, a judge's rulings are not a proper basis for disqualification. In *Ex parte American Steel Barrel Co.*, 230 U.S. 35 (1913), for example, a party to a bankruptcy proceeding sought to disqualify the presiding judge under Section 144 (then Section 21 of the Judicial Code) based on the judge's rulings in the case. The Court explicitly disapproved that use of the

statute, explaining that the provision "was never intended to enable a discontented litigant to oust a judge because of adverse rulings made, for such rulings are reviewable otherwise." 230 U.S. at 44. Similarly, in *Berger* v. *United States*, 255 U.S. at 31, the Court observed that "the bias or prejudice which can be urged against a judge must be based upon something other than rulings in the case."

To be sure, the Court has not had occasion to consider whether the same principle applies with equal force in cases arising under Section 455(a). There is no reason to believe, however, that the principle announced in *Berger* and *American Steel Barrel* rests on the particular language of Section 144 rather than on the commonsense notion that a judge's adverse rulings simply do not give rise to a reasonable inference of bias. So understood, those decisions undermine petitioners' argument that an ordinary person could reasonably question a judge's impartiality based on such rulings.

For their part, the courts of appeals have uniformly recognized that adverse rulings are ordinarily not a proper ground for disqualification under Section 455(a). See, *e.g.*, *Panzardi-Alvarez* v. *United States*, 879 F.2d 975, 984 (1st Cir. 1989), cert. denied, 493 U.S. 1082 (1990); *In re International Business Machines Corp.*, 618 F.2d 923, 929-930 (2d Cir. 1980); *Johnson* v. *Trueblood*, 629 F.2d 287, 291 (3d Cir. 1980), cert. denied, 450 U.S. 999 (1981); *Phillips* v. *Joint Legislative Comm.*, 637 F.2d 1014, 1020-1021 (5th Cir. 1981), cert. denied, 456 U.S. 960 (1982); *United States* v. *Sammons*, 918 F.2d 592, 599 (6th Cir. 1990); *Ouachita Nat'l Bank* v. *Tosco Corp.*, 686 F.2d 1291, 1300 (1982), adopted in pertinent part on reh'g, 716 F.2d 485, 488 (8th Cir. 1983) (en banc); *United States* v. *Nelson*, 718 F.2d 315, 321 (9th Cir. 1983); *Jaffe* v. *Grant*, 793 F.2d 1182, 1189 (11th Cir. 1986), cert. denied, 480 U.S. 931 (1987); *United States* v. *Haldeman*, 559 F.2d 31, 132 n.297 (D.C. Cir. 1976) (en banc, per curiam), cert. denied, 431 U.S. 933 (1977). As then-Judge Kennedy observed in *United States* v. *Conforte*, 624 F.2d at 882, "[a] judge's views on legal issues may not serve as the basis for motions to disqualify."

That this principle is not dependent on the validity of the extrajudicial-source requirement is demonstrated by the fact that the First Circuit, which declines to apply the extrajudicial-source requirement in cases arising under Section 455(a), has consistently rejected the notion that adverse judicial rulings may require recusal under Section 455(a). See, *e.g.*, *United States* v. *Cowden*, 545 F.2d 257, 265 (1st Cir. 1976), cert. denied, 430 U.S. 909 (1977); *United States* v. *Kelley*, 712 F.2d 884, 890 (1st Cir. 1983); *In re Cooper*, 821 F.2d 833, 838, 841, 843 (1st Cir. 1987) (per curiam); *Panzardi-Alvarez* v. *United States*, 879 F.2d at 984 & n.7. As the court explained in *In re Cooper*, "[w]hile § 455(a) is not quite as strict as § 144 in mandating an extrajudicial source of prejudice, mere disagreement over the state of the law or the correctness of the judge's factual findings will not suffice," 821 F.2d at 838 (citation omitted), because "the mere fact that a judge errs or makes clearly erroneous findings would not be indicative of bias." *Id.* at 841; see also *id.* at 843 ("Even a judge's mistaken judgment that an attorney is in need of sanction, like a judge's mistaken ruling on, say, a pretrial motion, would not establish prejudice or the appearance thereof.").

The Eighth Circuit, which does not appear to have applied the extrajudicial-source requirement to cases

arising under Section 455(a) (see Pet. Br. 13 n.6), has also held that "a judge should not disqualify himself solely on the basis of prior judicial rulings made during the course of the litigation." *Ouachita Nat'l Bank* v. *Tosco Corp.*, 686 F.2d at 1300. As the court explained, "[i]t should be self-evident that adverse rulings in themselves do not create judicial partiality." *Ibid.*[17]

3. The legislative history of the 1974 Act provides further support for the conclusion that adverse rulings are ordinarily an insufficient basis for seeking recusal under Section 455(a). The committee reports accompanying the 1974 Act explicitly cautioned against permitting recusal on such grounds:

> [I]n assessing the reasonablenes of a challenge to his impartiality, each judge must be alert to avoid the possibility that those who would question his impartiality are in fact seeking to avoid the consequences of his expected adverse decision. Disqualification for lack of impartiality must have a *reasonable* basis. Nothing in this proposed legislation should be read to warrant the transformation of a litigant's fear that a judge may decide a question against him into a "reasonable fear" that the judge will not be impartial. Litigants ought not have to face a judge where there is a reasonable question of impartiality [*sic*], but they are not entitled to judges of their own choice.

H.R. Rep. No. 1453, *supra*, at 5; S. Rep. No. 419, *supra*, at 5.

That statement suggests congressional approval of the principle that adverse decisions are not in themselves reasonable evidence of bias and therefore not a proper ground for disqualification. See *Ouachita Nat'l Bank* v. *Tosco Corp.*, 686 F.2d at 1300; *In re Corrugated Container Antitrust Litigation*, 614 F.2d 958, 966 & n.18 (5th Cir.), cert. denied, 449 U.S. 888 (1980). The statement also recognizes that a contrary rule would provide opportunities for "judge shopping" that would be detrimental to the efficient administration of justice. As the District of Columbia Circuit has observed, the impact of such a change in the law would be "[s]o drastic * * * that we are unwilling to ascribe to ethical and legislative formulators of the [appearance-of-impropriety] standard a purpose to direct it toward judicial rulings on questions of law." *United States* v. *Haldeman*, 559 F.2d at 133 n.297.

Petitioners point to no evidence of contrary legislative intent. Accordingly, even if Section 455(a) were deemed to abrogate the extrajudicial-source requirement, there would be no basis in law or policy for rejecting the settled principle that adverse rul-

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[17] The rule that adverse rulings are not grounds for disqualification applies to sentencing decisions just as it does to other rulings. *United States* v. *Conforte*, 624 F.2d at 882 (Kennedy, J.). To the degree that a sentencing scheme allows judges any amount of discretion in sentencing, different judges will bring different philosophies to bear. The mere fact that a judge sentences a defendant to a lengthier sentence for a particular offense than would other judges does not indicate bias. See, *e.g.*, *United States* v. *Guglielmi*, 615 F. Supp. 1506, 1511 (W.D.N.C. 1985), aff'd, 819 F.2d 451 (4th Cir. 1987), cert. denied, 484 U.S. 1019 (1988); *Markus* v. *United States*, 545 F. Supp. 998, 1000 (S.D.N.Y. 1982), aff'd mem., 742 F.2d 1444 (2d Cir. 1983) (Table); *King* v. *United States*, 434 F. Supp. 1141, 1145 (N.D.N.Y. 1977), aff'd, 576 F.2d 432 (2d Cir.), cert. denied, 439 U.S. 850 (1978).

ings are generally not a proper basis for a motion to recuse.[18]

III. PETITIONERS' RECUSAL MOTIONS FAILED TO DEMONSTRATE THAT THE DISTRICT JUDGE'S "IMPARTIALITY MIGHT REASONABLY BE QUESTIONED" UNDER ANY TEST

This is not a case in which the judge whose disqualification is sought made statements expressing bias or animosity toward petitioners. None of the remarks cited by petitioners contains even a trace of

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[18] The rule that a judge's adverse rulings do not constitute a proper basis for recusal under Section 455(a) is not the only limitation on the scope of that provision that would survive abrogation of the extrajudicial-source requirement. Thus, for example, it is well established that judges are not disqualified merely because they have been exposed during prior judicial proceedings to information that is damaging to a party and that may have caused the judge to form a negative opinion about that party or his case. As the First Circuit observed in *United States* v. *Cowden*, 545 F.2d at 266, "the judicial system could not function if judges could deal but once in their lifetime with a given defendant, or had to withdraw from a case whenever they had presided in a related or companion case or in a separate trial in the same case." Indeed, the judge who learns facts damaging to a defendant in a previous proceeding "is not [in a] much different [situation] from [the] judge [who] learns about evidence, later excluded, damaging to a defendant at a *voir-dire* or bench conference in the same proceeding." *Id.* at 265. See also *Panzardi-Alvarez* v. *United States*, 879 F.2d at 984; *United States* v. *Monaco*, 852 F.2d at 1147; *United States* v. *Bond*, 847 F.2d 1233, 1241 (7th Cir. 1988); *United States* v. *Nelson*, 718 F.2d at 321; *In re Cooper*, 821 F.2d at 844; *United States* v. *Wolfson*, 558 F.2d at 64. Petitioners have not alleged that the knowledge acquired by the district judge required recusal under Section 455(a), however, and this case therefore presents no occasion to address that question.

such sentiments. At bottom, petitioners' allegations of bias rest instead on the substance of various rulings and case-management decisions made by the district judge in presiding over the 1983 and 1991 trials.

Under either the extrajudicial-source requirement (see Part I, *supra*) or the rule that disqualification cannot be based on judicial rulings (see Part II, *supra*), petitioners' disqualification claim fails. There is no allegation that the district judge's alleged bias had an extrajudicial source, and virtually all of the instances of alleged bias cited by petitioners involved either legal rulings by the district judge or the judge's statements of his understanding of the requirements of the law and the propriety of particular evidence, arguments, or procedures.[19]

Even assuming that adverse judicial rulings and actions are a proper basis for motions to recuse under Section 455(a), recusal was not warranted in this case. None of the actions of the trial judge about which petitioners complained in their motions to recuse was inappropriate or even faintly suggestive of bias on the judge's part.[20]

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[19] Arguably, the judge's questioning of one of the prosecution witnesses at the 1983 trial (see p. 5, *supra*; Pet. Br. 29; 1983 Tr. 109-110) does not qualify as a judicial ruling that should generally be immune from challenge under Section 455(a). As we discuss below, however, the court's conduct in that incident was entirely proper.

[20] As noted above (see note 3, *supra*), petitioners John and Charles Liteky were not defendants in the 1983 trial. It is therefore difficult to understand the basis for their assertion that the judge's alleged display of prejudice against petitioner Bourgeois translates into a reasonable basis for questioning his impartiality toward them.

1. The challenged actions relate primarily to the judge's attempts to keep the trials moving in an efficient manner and to resist the apparent defense strategy of sidetracking both trials through the introduction of irrelevant political argument.[21] Petitioners find fault, for example, with the judge's indication at the outset of the 1983 trial that political argument would be inappropriate, and with his subsequent interruptions of argument and testimony at both trials when they became political. Pet. Br. 28-30. The judge's interventions, however, were wholly justified and quite restrained under the circumstances; he would have been derelict in carrying out his responsibilities if he had allowed the defense to deflect the purpose of the proceedings by turning the courtroom into a political forum.[22]

Nor was bias reflected by the single instance cited by petitioners (Br. 29) of the judge's interrupting defense counsel's examination of a witness at the 1983 trial in order to question the witness himself. It is well settled that judges may interrogate witnesses called by a party in order to clarify the testi-

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[21] Petitioners also complain that the district judge failed to refer to petitioner Bourgeois as "Father" during the 1983 trial. Pet. Br. 30. That allegation was not presented to the district judge as a basis for recusal, however, and thus it was waived. In any event, there is no suggestion that the court used demeaning terms in addressing defendant Bourgeois; the court's failure to address Bourgeois by the title of his choice—particularly in the absence of a jury—is a trivial matter.

[22] Moreover, it is questionable whether the judge's actions at the 1983 proceeding can even be regarded as adverse to the defense, since the arguments that the judge sought to prevent the defense from making would have been entirely counterproductive in that bench trial.

mony. See Fed. R. Evid. 614(b); *United States* v. *Lueth*, 807 F.2d 719, 727-729 (8th Cir. 1986); *United States* v. *Jackson*, 627 F.2d 1198, 1206 (D.C. Cir. 1980); *United States* v. *Zepeda-Santana*, 569 F.2d 1386, 1389 (5th Cir.), cert. denied, 437 U.S. 907 (1978). That is precisely what the court did here; after defense counsel mischaracterized the prior testimony of the assault victim by asking him where petitioner Bourgeois had "touched" him, the judge interceded in order to clarify the nature of the assault. See p. 5, *supra*. That intervention was entirely proper, especially where there was no jury in the case that might misinterpret the court's questioning.

As for petitioner Bourgeois's 18-month sentence for the 1983 convictions (see Pet. Br. 31), it was not unduly harsh. Bourgeois was convicted on three separate counts of reentering a military base after having been removed, two counts of wearing an Army uniform without authority to do so, and one count of simple assault, all in connection with a protest at Fort Benning of United States policy in Central America. Given the repeated nature of the violations and Bourgeois's total lack of remorse—indeed, his insistence that he would immediately repeat his violations if he were not imprisoned (1983 Tr. 155)—a substantial sentence was called for.

Finally, the court's failure to employ a presentence report in imposing the sentence after the 1983 trial (see Pet. Br. 30-31) was not disqualifying. The preparation and consideration of a presentence report is not a prerequisite to a lawful sentence. See Fed. R. Crim. P. 32(c); *United States* v. *Latner*, 702 F.2d 947, 949 (11th Cir.) (per curiam), cert. denied, 464 U.S. 914 (1983); *Reed* v. *United States*, 529

F.2d 1239, 1241 (5th Cir.), cert. denied, 429 U.S. 887 (1976).[23] A court may conclude that the trial record itself contains information "sufficient to enable the meaningful exercise of sentencing authority." Rule 32(c)(1).[24] The district court in the 1983 case afforded the defendants and their attorneys an opportunity to present statements and to bring to the court's attention any mitigating factors, and the defendants took advantage of that opportunity. See 1983 Tr. 166-169. Under any standard, therefore, the district court was correct in denying petitioners' recusal motions.

2. In addition to the grounds relating to the 1983 trial, petitioners have raised in this Court a number of claims of improper conduct of the trial judge in the 1991 trial that they contend indicates bias against them. Most of those claims were not presented in petitioners' motions to recuse, and accordingly they are waived as grounds for recusal; in any event, the claims do not establish bias under any standard.

a. The first incident of alleged bias at the 1991 trial (Pet. Br. 33) occurred at the outset of the trial, when petitioners failed to arrive in court at the appointed hour. Petitioner Bourgeois's counsel asserted that petitioners were still "getting through the

[23] Indeed, during the same time period that petitioner Bourgeois was sentenced without preparation of a presentence report, the same approach appears to have been followed in a significant minority of criminal cases nationwide. See Annual Report of the Director of the Administrative Office of the United States Courts 20, 362 (1984).

[24] The district court should have explained on the record its finding that a presentence report was unnecessary. See Fed. R. Crim. P. 32(c)(1). None of the defendants objected to the court's procedure, however, and its failure to comply with a technical requirement of the Rule does not indicate that it was biased.

metal-detection device down on the first floor." 1991 Tr. 3. The judge replied that "nobody else seems to have had any problems getting through the device," and then turned to another matter. *Ibid.* When the defendants had still not arrived, the judge stated, "We'll sit here and wait five more minutes. If they're not here in five minutes, I'll issue a bench warrant for their arrest. We're going to sit here five more minutes." *Id.* at 4. Shortly thereafter, petitioners arrived and apologized for their tardiness. *Id.* at 4-5. No objection was made to the judge's comments.

Petitioners had been released on bond pending trial (1991 Tr. 4), and thus they were under legal compulsion to be present in court at the hour appointed for trial. Rather than take immediate remedial measures when petitioners failed to appear for their trial, however, the court gave them additional time in which to appear. Far from demonstrating bias or prejudice, the judge's actions were appropriate under the circumstances.

b. Petitioners next complain (Br. 36-37) that the district judge refused to permit them to testify about their motives in splashing blood on various items of government property at Fort Benning, while at the same time permitting the government to introduce evidence in the form of documents prepared by petitioners that explained the purpose of their actions.[25] As the prosecutor noted at trial, however, the documents were "part of the evidence of the crime with which the defendants are charged," 1991 Tr.

[25] This is the only claim arising out of the 1991 trial, other than the court's comment about counsel's opening statement, see pp. 11-12, *supra*, that was even arguably presented to the district judge as a basis for recusal, and then only by petitioner Bourgeois. See 1991 Tr. 201-202.

206, since they provided additional evidence that petitioners had committed the acts alleged. Petitioners' motive for their conduct, on the other hand, was not an element of the offense. Nonetheless, the district judge permitted petitioners to testify about the contents of those documents and to have the documents read to the jury. 1991 Tr. 184-185, 199-200, 219-222. Thus, the court permitted petitioners to use the documents to interject the issue of motive into the trial; it is impossible to understand how the judge's decision to let petitioners achieve that objective evidences bias or prejudice against them.

c. Petitioners claim (Br. 34) that the judge's "most outrageous conduct" occurred when petitioner Charles Liteky, who served as his own counsel at trial, was examining himself about his military service in Vietnam. Liteky asked himself whether his experience in Vietnam had had any influence on his life, and then answered by stating: "I think that Vietnam has had a profound [influence] on my life. My experience in Vietnam was part of my awakening." 1991 Tr. 210. At that point, the district judge interjected, "Now, we'll just have to restrain yourself from testifying about things that don't have anything to do with this case. In other words, all your experiences in Vietnam and all of that, how that may have affected your life and so on, that has nothing to do with the trial of this case." *Ibid.* The following exchange then occurred:

> [MR. LITEKY]: Your Honor, as my own counsel, what I was trying to establish here—I'll be moving on from Vietnam very quickly. But what I was trying to establish is who I am.
>
> THE COURT: Well—
>
> [MR. LITEKY]: Who I am has a lot to do with where I've been and what I've done, does it not?

> THE COURT: You are the person named in this indictment, aren't you?
>
> [MR. LITEKY]: I am, Your Honor.
>
> THE COURT: All right. That's who you are. Now—
>
> [MR. LITEKY]: And that's all I am?
>
> THE COURT: Let's go ahead with the trial of this case.

Id. at 211.[26]

According to petitioners (Br. 36), that brief exchange "implied that Liteky's only relevant background experience was that he had been charged with a crime." Viewed in context, however, it is apparent that the judge's comment was merely one in a series of appropriate, though generally unsuccessful, attempts to bring the focus of the trial back to where it belonged, *i.e.*, the events of November 16, 1990, at Fort Benning.[27]

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[26] Petitioner Charles Liteky did not object to the judge's statements. Petitioner Bourgeois's counsel moved for a mistrial or for severance on the basis of the judge's statement that Liteky was "the person named in this indictment" (see 1991 Tr. 211-212), but none of the petitioners moved for recusal on that ground.

[27] Petitioners assert (Br. 35 n.21) that criminal defendants have "the right to present evidence of specific instances of conduct demonstrating good character." Accordingly, they argue that the district judge erred in refusing to permit Charles Liteky to describe how his experience in Vietnam affected his life. That contention is incorrect. Criminal defendants have the right to offer evidence of "a *pertinent* trait of character," Fed. R. Evid. 404(a)(1) (emphasis added), but Liteky's "awakening" in Vietnam in the 1960's was not relevant to the question whether he willfully caused damage to property of the United States on November 16, 1990. Moreover, specific instances of conduct are inadmissible to prove a witness's character except where "character or a trait of character of a person is an essential element of a charge,

d. The next incident of alleged bias at the 1991 trial (Pet. Br. 32-33) occurred during the testimony of petitioner Bourgeois. Bourgeois's counsel questioned him at length about the events leading up to his 1983 conviction. 1991 Tr. 238-240. As petitioner was testifying about the tape-recorded message he attempted to play to Salvadoran troops at Fort Benning, the prosecutor objected on relevancy grounds. *Id.* at 240. Before ruling on the prosecutor's objection, the judge questioned Bourgeois about the facts underlying the 1983 conviction, explaining, "I just wanted to get the setting right." *Id.* at 241. Petitioners did not interpose an objection to the judge's questioning. The judge then overruled the prosecutor's objection and permitted Bourgeois to continue testifying along the same lines. *Id.* at 241-242. Nothing about that incident demonstrates bias or prejudice on the judge's part.

e. During cross-examination, the prosecutor asked Bourgeois several times whether he knew that his actions in throwing blood on the walls, carpet, and other items at a building at Fort Benning would cause damage. Bourgeois gave several evasive and non-responsive answers, even after the judge directed him to answer the question. 1991 Tr. 259-260. Accordingly, the judge again intervened, stating, "Just a moment. The question was, did you know that that was going to damage the property that you were throwing blood on, didn't you know that, the carpet and the pictures and everything else. * * * Now answer that question." *Id.* at 260-261. Bourgeois replied, "Yes, but insignificant damage to the others, the people who were really damaged." *Id.* at 261.

---

claim, or defense." Fed. R. Evid. 405(b). The defendant's character is not an element of or a defense to a charge under 18 U.S.C. 1361.

Thus, Bourgeois's recalcitrance forced the judge to twice order him to answer the prosecutor's questions. Judicial efforts to compel parties to abide by the basic rules of courtroom procedure do not evidence bias. Again, petitioners did not object to the judge's ruling.

f. Petitioners also allege (Br. 38) that the district judge's conduct at the sentencing hearing evinced bias. After imposing sentence on petitioner Charles Liteky, the judge asked whether there were "any objections to the sentence or the manner in which it was imposed." 1991 Tr. 371. Liteky replied that he would be filing an appeal *in forma pauperis*. *Ibid.* Thereafter, petitioner's counsel stated, "I would make the same announcement for Mr. Charles Liteky that [counsel] intends to file—." *Id.* at 372. The judge replied, "He can do whatever he wants to do." *Ibid.* After petitioner's counsel explained that he made that "announcement in case there were questions about indigency that needed to be addressed," the judge replied, "I'm not going to address it at this time." *Ibid.* Nothing about that exchange would suggest to a reasonable observer that the judge was biased against petitioners.

In sum, the instances of alleged misconduct by the court during the 1991 trial, even if they were relevant to the issue of judicial bias, and even if petitioners had relied upon them in support of their motions to recuse, would not have required recusal on grounds of bias or the appearance of partiality.[28]

---

[28] Petitioners contend (Pet. Br. 25-26) that any violation of Section 455(a) in this case would require reversal and remand for a new trial. As this Court made clear in *Liljeberg*, however, violations of Section 455(a) are subject to review for harmless error. 486 U.S. at 862; see also Fed. R. Crim. P. 52(a). Moreover, it is open to question whether the erroneous

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted.

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AUGUST 1993

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denial at trial of a motion to recuse under Section 455(a) may ever appropriately lead to reversal of a conviction; as the Seventh Circuit has observed:

> It is a fundamental principle of appellate review that unless an error affects the substantial rights of the appellant, it is not a basis of reversal. * * * [I]f a judge proceeds in a case when there is (only) an appearance of impropriety in his doing so, the injury is to the judicial system as a whole and not to the substantial rights of the parties. The parties in fact receive a fair trial, even though a reasonable member of the public might be in doubt about its fairness, because of misleading appearances.

United States v. *Balistrieri*, 779 F.2d at 1204-1205. In any event, if the Court were to determine that the district court erred in denying petitioners' motions to recuse, we submit that the appropriate course would be a remand to the court of appeals for a harmless-error determination. See *Liljeberg*, 486 U.S. at 862 ("[I]n many cases * * * the Court of Appeals is in a better position to evaluate the significance of a violation than is this Court. Its judgment as to the proper remedy should thus be afforded our due consideration.").

APPENDIX

STATUTORY PROVISIONS INVOLVED

1. 28 U.S.C.:

§ 144. Bias or prejudice of judge

Whenever a party to any proceeding in a district court makes and files a timely and sufficient affidavit that the judge before whom the matter is pending has a personal bias or prejudice either against him or in favor of any adverse party, such judge shall proceed no further therein, but another judge shall be assigned to hear such proceeding.

The affidavit shall state the facts and the reasons for the belief that bias or prejudice exists, and shall be filed not less than ten days before the beginning of the term at which the proceeding is to be heard, or good cause shall be shown for failure to file it within such time. A party may file only one such affidavit in any case. It shall be accompanied by a certificate of counsel of record stating that it is made in good faith.

§ 455. Disqualification of justice, judge, or magistrate

(a) Any justice, judge, or magistrate of the United States shall disqualify himself in any proceeding in which his impartiality might reasonably be questioned.

(b) He shall also disqualify himself in the following circumstances:

(1) Where he has a personal bias or prejudice concerning a party, or personal knowl-

edge of disputed evidentiary facts concerning the proceeding;

(2) Where in private practice he served as lawyer in the matter in controversy, or a lawyer with whom he previously practiced law served during such association as a lawyer concerning the matter, or the judge or such lawyer has been a material witness concerning it;

(3) Where he has served in governmental employment and in such capacity participated as counsel, adviser or material witness concerning the proceeding or expressed an opinion concerning the merits of the particular case in controversy;

(4) He knows that he, individually or as a fiduciary, or his spouse or minor child residing in his household, has a financial interest in the subject matter in controversy or in a party to the proceeding, or any other interest that could be substantially affected by the outcome of the proceeding;

(5) He or his spouse, or a person within the third degree of relationship to either of them, or the spouse of such a person:

(i) Is a party to the proceeding, or an officer, director, or trustee of a party;

(ii) Is acting as a lawyer in the proceeding;

(iii) Is known by the judge to have an interest that could be substantially affected by the outcome of the proceeding;

(iv) Is to the judge's knowledge likely to be a material witness in the proceeding.

* * * * *

(d) For the purposes of this section the following words or phrases shall have the meaning indicated:

* * * * *

(4) "financial interest" means ownership of a legal or equitable interest, however small, or a relationship as a director, adviser, or other active participant in the affairs of a party, [with certain exceptions].

* * * * *

(e) No justice, judge, or magistrate shall accept from the parties to the proceeding a waiver of any ground for disqualification enumerated in subsection (b). Where the ground for disqualification arises only under subsection (a), waiver may be accepted provided it is preceded by a full disclosure on the record of the basis for disqualification.

* * * * *

2. 28 U.S.C. (1970):

§ 455. Interest of justice or judge

Any justice or judge of the United States shall disqualify himself in any case in which he has a substantial interest, has been of counsel, is or has been a material witness, or is so related to or connected with any party or his attorney as to render it improper, in his opinion, for him to sit on the trial, appeal, or other proceeding therein.

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No. 92-6921

In The

Supreme Court of the United States

October Term, 1993

JOHN PATRICK LITEKY,
CHARLES JOSEPH LITEKY, AND
ROY LAWRENCE BOURGEOIS,

Petitioners,

v.

UNITED STATES OF AMERICA,

Respondent.

On Writ Of Certiorari
To The United States Court Of Appeals
For The Eleventh Circuit

PETITIONERS' REPLY BRIEF

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QUESTION PRESENTED

Whether 28 U.S.C. §455(a), which provides that "any judge . . . shall disqualify himself in any proceeding in which his impartiality may reasonably be questioned," requires that the cause of the appearance of bias stem from an extrajudicial source?

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OPINION BELOW

This appeal arises from the judgment of the Eleventh Circuit Court of Appeals dated September 28, 1992 which affirmed the decision of United States District Court for the Middle District of Georgia. *United States v. Liteky*, 973 F.2d 910 (11th Cir. 1992).

JURISDICTION

Petitioners John Liteky, Charles Liteky and Roy Bourgeois were convicted of willfully injuring federal property in violation of 18 U.S.C. §1361. They were sentenced to guideline terms of six months, six months and 18 months, respectively. The United States Court of Appeals for the Eleventh Circuit affirmed the decision of the district court in a published opinion filed September 28, 1992. This Court has jurisdiction to review the judgment of the Court of Appeals pursuant to 28 U.S.C. §1254(1).

FEDERAL STATUTE INVOLVED

Title 28 U.S.C. §455(a) provides:

> Any justice, judge, or magistrate of the United States shall disqualify himself in any proceeding in which his impartiality might reasonably be questioned.

ARGUMENT

Petitioners twice moved for the district judge's recusal in this case, not on the basis of his rulings in prior judicial proceedings, but rather due to his conduct, which gave rise to an appearance of partiality. On the basis of obsolete legal formalism, the district judge, Judge J. Robert Elliott, refused even to consider the merits of petitioners' motion for recusal; this error of law requires reversal of petitioners' convictions.

Because the district judge erroneously refused to consider petitioners' argument that his conduct during prior judicial proceedings gave rise to an appearance of bias, and because harmless error analysis does not apply to violations of 28 U.S.C. §455, this Court should, at a minimum, remand this case to the Eleventh Circuit Court of Appeals for further proceedings.

Alternatively, if this Court concludes that Judge Elliott's conduct was so inimical to the appearance of impropriety as to threaten confidence in the judiciary, it should reverse petitioners' convictions and remand for a new trial.

I. CONGRESS, BY THE ADOPTION OF 28 U.S.C. §455, INTENDED TO REMOVE THE EXTRAJUDICIAL SOURCE REQUIREMENT

Respondent contends that the 1974 amendments to Section 455 were not intended to "dramatically alter the

law of recusal for bias or prejudice." Resp. Br. at 19.[1] In fact, however, congress did intend the 1974 revisions to alter significantly the grounds for recusal. H.R. Rep. No. 1453, 93d Cong., 2d Sess. 1-2 (1974) ("House Report"). Indeed, attorney John Frank, upon whose interpretation of Section 455(a) respondent relies, exclusively, in defending the extrajudicial source requirement, insisted at legislative hearings on the 1974 Act that Section 455 "needs a complete rewrite." *Hearing on S. 1064 before the Subcomm. on Improvements in Judicial Machinery of the Comm. on the Judiciary, 93rd Cong., 1st Sess.* 113 (1973) ("*Senate Hearing*").

Respondent correctly points out that under the new Section 455(a), "the statute leaves to the courts the task of determining what circumstances may be said to raise reasonable questions regarding the court's impartiality." Resp. Br. at 20. Respondent offers no explanation, however, for why it is reasonable to believe that bias acquired in the course of a judicial proceeding is innocuous. Nor does respondent explain why a judicially-acquired appearance of bias does not threaten the public's confidence in the judiciary, the motivating concern behind the adoption of the amendments to Section 455(a). *See* House Report at 5. In fact, where courts have been free to

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[1] Respondent repeatedly characterizes elimination of the extrajudicial source requirement as a "dramatic" and "fundamental" change. *See id.* at 19, 22, 27. It is somewhat disturbing that the Solicitor General of the United States considers the notion that a criminal defendant is entitled to an impartial judge free of bias and prejudice regardless of source, to be such a radical concept.

fashion their own notion of "reasonableness" in developing standards for judicial disqualification, they have concluded that bias arising in the course of judicial proceedings is relevant to the disqualification inquiry. *See, e.g., Offutt v. United States*, 348 U.S. 11, 16-18 (1954) (appellate court's supervisory authority includes power to order judicial disqualification on the basis of courtroom conduct); *Haines v. Liggett Group, Inc.*, 975 F.2d 81, 97 (3d Cir. 1992) (same); *United States v. Jacobs*, 855 F.2d 652, 656 (9th Cir. 1988) (same).

Respondent also suggests that abrogation of the extrajudicial source requirement would be inefficient because it would lead to mid-trial mandamus petitions, interrupting "virtually every trial." Resp. Br. at 30. Respondent offers no indication, however, that mandamus petitions have skyrocketed in any of the Circuit Courts of Appeal which have held that Section 455(a) requires recusal for judicially-acquired bias. In fact, computer-assisted legal research has revealed that since the First Circuit's landmark decision in *United States v. Chantal*, 902 F.2d 1018 (1st Cir. 1990), no mandamus petitions have been brought on the basis of Section 455(a) for judicially-acquired bias in the First Circuit.[2] If anything, elimination of the extrajudicial source requirement will increase judicial efficiency because judges, once liberated from the yoke of archaic legal formalism, will be free to make the correct recusal decision in the first instance,

[2] Search of LEXIS, Ganfed Library, 1 Cir File (Sept. 14, 1993) (search for records containing RECUSE and MANDAMUS in full text).

rather than being forced to preside over the trial, only to face judicial disqualification on appeal.[3]

The only other justification respondent offers for continued adherence to the extrajudicial source requirement under Section 455(a) rests on the statements of Lewis & Roca attorney John Frank to a Senate Subcommittee during a hearing on the bill which amended Section 455. Resp. Br. at 22-25.[4]

The first statement on which respondent relies occurred during a discussion over the meaning of Section 455(a):

> *MR. KASTENMEIER.* Page 1, line 6, I am wondering what the practical meaning of this is:

[3] Although many circuits forbid a judge from recusing herself on the basis of judicially-acquired bias, they will nonetheless disqualify a judge on remand if her courtroom conduct gives rise to an appearance of bias. *See, e.g., Jacobs*, 855 F.2d at 656 & n.2.

[4] Mr. Frank was not involved in drafting the amended §455 which Congress ultimately adopted. Nor did Congress consider Mr. Frank's statements sufficiently important to be included in the reports. S. Rep. No. 419, 93d Cong., 1st Sess. (1973); House Report. Nor is there *any* indication that *any* member of Congress accepted Mr. Frank's interpretation of §455(a). Respondent insists Mr. Frank's statements merit serious consideration because he drafted one of the predecessor bills to S. 1064. Resp. Br. at 22 & n.12. Importantly, however, neither of the predecessor bills to S. 1064 contained language with even remote similarity to that which was ultimately adopted as §455(a). S. 1553, 93rd Cong., 1st Sess. (1971); S. 1886, 93rd Cong., 1st Sess. (1971).

> Any justice shall disqualify himself in any proceeding in which his impartiality might reasonably be questioned.

MR. FRANK. May I address myself to that? As you have said, the Committee does not deal with this commonly and therefore you may be unaware that these are terms of art. . . .

For example, it has been the fixed practice that a judge may have developed points of view on a matter because he has handled the same matter previously and been involved in it; something of that sort. To the extent he has made up his mind. To challenge on that ground is not permitted by this clause at all. It is meant to cover the kind of thing where, for example, personal relationships are involved.

Hearing on S. 1064 before the Subcomm. on Courts, Civil Liberties, and the Administration of Justice of the House Comm. on the Judiciary, 93rd Cong., 2d Sess. 14-15 (1974) (*"House Hearing"*).

According to respondent, Mr. Frank's statement "can only be understood as a reference to the extrajudicial source requirement." Resp. Br. at 24. In fact, however, it is much more likely that Mr. Frank was simply referring to large multi-case class action litigation.[5] He was seeking to assure the subcommittee that mere participation in the same matter previously would not require a judge to disqualify herself. Nothing in Mr. Frank's statement should be read as implying that a judge should continue

[5] This Court has recognized such cases present "unique difficulties in monitoring any potential interest." *Liljeberg v. Health Services Acquisition Corp.*, 486 U.S. 862, n.9 (1988).

to preside over a matter once she has recognized that her conduct in a prior judicial proceedings has given rise to an appearance of bias.

Moreover, there is no indication that Mr. Frank believed Section 455(a) was exclusively limited to personal relationships. Indeed, if that were Congress's intent, it would have included the word "personal" in the language of that subsection, much as it did in Sections 144 and 455(b)(1).[6]

Respondent also relies on the following passage:

> Mr. Frank. The judge, unless his impartiality may reasonably be questioned in terms of common traditions of what is a reasonable doubt, does have a duty to sit. He is required to go back to the books and find out what the traditions and practices have been. There will be growth and change, of course, as there always will be in the common law, but Chief Justice Traynor . . . was not telling judges to go off and take vacations just because cases were uncomfortable. That is not what this means. You concur, I believe.
>
> Judge Traynor. Right.

House Hearing at 15. This passage does not refer to the extrajudicial source requirement, but rather addresses

[6] It is also clear that Judge Traynor, with whom Mr. Frank testified at the House Hearing, believed that Section 455(a) was broad enough to cover more than personal relationships. *See Senate Hearing* at 86-89 (suggesting that a judge who expressed an opinion concerning the merits of the controversy while in government service should recuse herself under both §455(a) and §455(b)(3)).

Congress's concern that judges may use Section 455 to avoid sitting in difficult or controversial cases. Furthermore, for the purpose of this case, the pertinent tradition and practice for the law of recusal is that the word "personal" correlates with "extrajudicial." Indeed, the genesis for the extrajudicial source requirement was Congress's use of the word "personal" in 28 U.S.C. §144. *United States v. Grinnell Corp.*, 384 U.S. 563, 583 (1966). A judge who went back to the books to "find out what the traditions and practices have been" would therefore reasonably conclude that by dropping the word "personal" in Section 455(a), Congress intended to abandon the extrajudicial source requirement.[7]

In this respect, Congress's adoption of Section 455(a), and its corresponding expansion of the grounds for recusal to include nonpersonal, judicial, bias does not "change the interpretation of a judicially created concept." *See Midlantic National Bank v. New Jersey Dept. of Environmental Protection*, 474 U.S. 494, 501 (1986). Rather, petitioners' interpretation of Section 455(a) is faithful to the judicial interpretation of Section 144 and prior recusal decisions.

Respondent's interpretation of the legislative history, in contrast, is at odds with Congress's expressed intent. Respondent maintains that the amendments to Section 455(a), served only to replace the subjective "bias-in-fact"

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[7] Mr. Frank's statement that §455(a) includes "terms of art" also supports this reading of the statute. To the extent that the word "personal" is a term of art, its omission from §455(a) is significant; in this case, determinative.

standard with an objective "appearance-of-bias" standards and to abandon the "duty to sit" rule. Resp. Br. at 20-21. Respondent also concedes, however, that Section 455(a) "broadened the *grounds* for disqualification." *Id.* at 28 (emphasis added). If respondent's interpretation is correct, Congress's amendments would not have "broadened the grounds," but rather only altered the standards, for judicial disqualification. By broadening the grounds for disqualification, Congress intended to create an entirely new basis for recusal. Respondent's theory that the amendments to Section 455 only altered the standards for recusal is therefore too narrow to give effect to Congress's expressed intent.

Congress's intent is not ambiguous. It intended to broaden the grounds for judicial disqualification by abrogating the extrajudicial source requirement. Its intention to allow for recusal based on judicially acquired bias is clearly articulated by the notable absence of the word "personal" in the text of Section 455(a).

II. ALLEGATIONS OF APPEARANCE OF BIAS BASED ON A JUDGE'S CONDUCT ARE SUFFICIENT TO REQUIRE RECUSAL

Those courts which have rejected the extrajudicial source requirement recognize that a judge's conduct during the course of trial justifies recusal if it gives rise to an appearance of bias. *See United States v. Chantal*, 902 F.2d 1018, 1022 (1st Cir. 1990) (district judge's demeaning comments toward defendant could form basis for recusal); *Nicodemus v. Chrysler Corp.*, 596 F.2d 152, 155-57 (6th Cir. 1979) (*sua sponte* recusing district court judge due to his

criticism of a party during a pretrial hearing); *see also United States v. Hickman*, 592 F.2d 931, 933-36 (6th Cir. 1979) (district judge's one-sided interventions and interruptions of cross-examination denied defendant a fair trial).

Respondent concedes that improper *conduct* can require recusal, Resp. Br. at 38-39 & 19, but nonetheless mischaracterizes petitioners' recusal motions as based on Judge Elliott's adverse *rulings*. Resp. Br. at 29-38. According to respondent, "[t]his is not a case in which the judge whose disqualification is sought made statements expressing bias or animosity towards petitioners." Resp. Br. at 38. In fact, that is precisely what petitioners argued in their motions for recusal. The record is clear that the recusal motions were premised on the judge's conduct, not his rulings. *See* Defendants' Motion to Recuse (filed Feb. 4, 1991) (Joint Appendix, p. 2); Trial transcript, *United States v. Liteky*, Case No. 91-93 Col, 251-52 (M.D. Ga. Mar. 25, 1991) ("1991 Trans.").

Respondents may disagree that Judge Elliott's conduct was so improper as to require recusal had he considered petitioners' motions, but that dispute is purely academic because he refused to do so. As a result, if this Court finds that the extrajudicial source limitation does not apply to recusal motions brought pursuant to Section 455(a), Judge Elliott's refusal to consider petitioners' motions was an error of law. The particular factual circumstances which petitioners contend give rise to an appearance of impartiality are relevant only to a determination of the appropriate remedy for that error of law.

Petitioners agree that "adverse rulings *in themselves* do not create judicial partiality." *Quanchita Nat'l Bank v. Tosco Corp.*, 686 F.2d 1291, 1300 (8th Cir. 1982) (emphasis added).[8] Petitioners' allegations of appearance of partiality, however, center on Judge Elliott's conduct. For example, Judge Elliott's interruption of Father Bourgeois' attorney's cross-examination of the alleged assault victim was not an error of law. It was, however, disruptive, demeaning, and one-sided. Trial Transcript, *United States v. Ventimiglia*, C.A. No. 83-316-COL, 100 (M.D. Ga. Sept. 14, 1983) ("1983 Trans.").[9] As such, when considered in light of Judge Elliott's repeatedly one-sided conduct throughout the 1983 trial, this episode gives rise to an appearance of bias.[10]

Similarly, petitioners do not contend that Judge Elliott was legally in error for refusing to refer to Father

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[8] However, a judge's erroneous rulings, including sentencing decisions, when combined with other episodes of conduct reflecting an appearance of bias, can form the grounds for disqualification. *United States v. Holland*, 655 F.2d 44, 46-47 (5th Cir. 1981) (disqualifying district judge under § 455(a) for increasing defendant's sentence because he appealed an earlier conviction, among other reasons).

[9] The manner in which Father Bourgeois made physical contact with the alleged assault victim was a disputed factual issue. Judge Elliott's interruption evidenced the fact that he sided with the government's interpretation of events.

[10] Nor does the fact that the 1983 trial was not in the presence of a jury mitigate the appearance of bias which resulted from Judge Elliott's conduct at that trial. *See Holland*, 655 F.2d at 47, n.5 (rejecting "the Government's argument that there was no bias because the trial judge's comments were made outside the presence of the jury").

Bourgeois by his appropriate title: "Father." 1983 Trans. at 22, 35, 36, 38, 50, 58, 59, 60, 63, 66, 78, 93, 94. Rather, this discourtesy simply highlights Judge Elliott's attitude toward Father Bourgeois throughout the entire 1983 trial.

At the 1991 trial, as well, it was Judge Elliott's conduct to which petitioners objected. For example, Judge Elliott's threat to issue bench warrants for petitioners' arrest before the entire jury venire, which was precipitated by their unavoidable delay at the metal detector on the first floor of the courthouse, was not legally erroneous. 1991 Trans. at 3-4. It was, however, intemperate and unnecessary for Judge Elliott to issue this stinging condemnation in front of prospective jurors. If Judge Elliott were interested in maintaining an atmosphere of decorum and fairness, he would have called counsel into chambers and inquired as to petitioners' whereabouts. Likewise, Judge Elliott's heated statement that Petitioner Charles Liteky was nothing more than a name in the indictment was demeaning and unnecessary personal criticism. 1991 Trans. at 211. That Judge Elliott's decision to cut off Liteky's testimony concerning his background erroneously prevented him from introducing pertinent state of mind evidence made that episode even more inappropriate, but it was the unnecessarily demeaning conduct, not the error of law, which petitioners argue gives rise to an appearance of bias.

Furthermore, the district judge's decision to exclude evidence of petitioners' state of mind when offered by petitioners, yet to admit such evidence when the prosecution sought its admission, was one-sided, regardless of whether it was technically in error. 1991 Trans. at 196-97;

199-200. His disparaging references and repeated expressions of preference toward the prosecution in repartee with defendants are all conduct indicative of bias.

Respondent's incessant focus on isolated individual rulings is misleading. The conduct surrounding a ruling or interaction with the parties is the essence of the subjective measurement of bias.

> " . . . nothing prevents a thing being good in itself, and yet becoming a source of evil to one who makes use thereof unbecomingly . . . ".

Summa Theologica, St. Thomas Aquinas; First Complete American Edition in 3 Volumes, Vol. 2, p. 1579, literal translation by Fathers of the English Dominican Province, 1947.

Petitioners' motions for recusal were based on Judge Elliott's "statements expressing bias or animosity towards petitioners," not simply in response to adverse legal rulings.

In fact, one of the best single examples of conduct indicating bias which is not a ruling was Judge Elliott's refusal to sign the CJA-24 form and sending this form for payment for the transcript back to the Eleventh Circuit because he would not grant leave to appeal *in forma pauperis*.

Because the text, history and policy of Section 455(a) makes clear that judicial conduct which gives rise to an appearance of bias provides adequate grounds for a motion for recusal, Judge Elliott's refusal to consider petitioners' motions was in error.

III. REVERSAL OF PETITIONERS' CONVICTIONS AND REMAND FOR A NEW TRIAL IS THE CORRECT REMEDY IN THIS CASE

In a footnote respondent argues, relying on this Court's decision in *Liljeberg v. Health Services Acquisition Corp.*, 486 U.S. 847 (1988), that violations of Section 455(a) are subject to harmless error analysis. Resp. Br. at 47, n.28.[11] *Liljeberg* does not, however, stand for the proposition that harmless error analysis can apply to a situation in which a district judge denies a criminal defendant's motion for recusal due to an erroneous legal determination.

First, *Liljeberg* involved the unique situation where a civil litigant sought to have a judgment against him vacated pursuant to Fed.R.Civ.P. 60(b). *Liljeberg*, 486 U.S. at 862.

Second, this Court only indicated that harmless error analysis could apply in situations where "a busy judge . . . inadvertently overlook[ed] a disqualifying circumstance." *Id.* at 862. That is not the case here. In this case, Judge Elliott refused even to consider the merits of petitioners' motions for recusal because he erroneously

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[11] Respondent also cites *United States v. Balistrieri*, 779 F.2d 1191, 1204-05 (7th Cir. 1985), *cert. denied*, 475 U.S. 1095 (1986) for the proposition that "it is open to question whether the erroneous denial at trial of a motion to recuse under Section 455(a) may ever appropriately lead to reversal of a conviction." Resp. Br. at 47, n.28. *Liljeberg*, however, decided three years after the *Balistrieri* decision, answered that question. In *Liljeberg*, this Court vacated a judgment against petitioner on the basis of § 455(a). 486 U.S. at 862-70.

believed that Section 455(a) did not permit him to consider bias which arose in the course of judicial proceedings.

Third, harmless error analysis cannot apply to recusal decisions in criminal cases. Respondent does not dispute that criminal cases involving a judge's actual bias or prejudice are immune from harmless error analysis. *See Chapman v. California*, 386 U.S. 18, 23, n.8 (1967); *Tumey v. Ohio*, 273 U.S. 510 (1927). Nor does respondent dispute that the "appearance of impartiality is virtually as important as the fact of impartiality." *Webbe v. McGhie Land Title Co.*, 549 F.2d 1358, 1361 (10th Cir. 1977). These two long-standing and unchallenged rules of law, when taken together, yield the unmistakable conclusion that harmless error analysis does not apply to violations of Section 455(a) in criminal trials. *See Sullivan v. Louisiana*, ___ U.S. ___, 133 S.Ct. 2078, 2081-83 (1993).

The absence of harmless error analysis in this case requires that petitioners' convictions be reversed. *See Chantal* 902 F.2d at 1024 (reversing guilty plea). Whether this Court should also remand this case for a new trial, or simply remand to the Eleventh Circuit for additional proceedings,[12] turns on "the risk of undermining the public's confidence in the judicial process." *Liljeberg*, 486 U.S. at 864.

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[12] The Eleventh Circuit would then have to decide whether to remand for a new trial in light of petitioner's allegations of appearance of bias or remand to the district judge for reconsideration of petitioners' original motions for recusal. *See id.* at 1024 (remanding to district judge to consider defendants' motion for recusal).

In evaluating the appropriate remedy in this case, this Court should consider not only those instances of conduct specifically presented to the district court in petitioners' original motions to recuse, but the entire record of proceedings at both the 1983 and 1991 trials and the events which have occurred subsequent to the 1991 trials. *Cf. Liljeberg*, 486 U.S. at 867 (judge's rationale for denying petitioners' motion for recusal contributed to risk of undermining public's confidence in judiciary).[13]

Respondent addressed some of the particular instances of Judge Elliott's conduct cited in Petitioners' Brief on an incident-by-incident basis, but refused to consider the impact of Judge Elliott's one-sided and demeaning comments when taken as a whole. Resp. Br. at

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[13] Respondent repeatedly accuses petitioners of having waived particular grounds for recusal by not raising them at the district court level. Resp. Br. at 42-43. This argument, however, misses the point that the specific instances of conduct which petitioners have cited to this Court are only relevant for the purpose of remedy, not assignment of error. The error in this case was a pure and unadulterated error of law. Moreover, petitioners twice moved for the district judge's recusal. They should not be forced to punctuate every episode of the judge's discourteous and demeaning conduct with an objection and another motion for recusal. *Cf. Hickman*, 592 F.2d at 936 (defendant's decision not to object to judge's conduct for fear of further antagonizing both judge and jury did not prevent consideration of judge's conduct in fair trial inquiry).

38-47.[14] The ABA Standards for Criminal Justice, §6.34 at 33 (2d ed. 1980) admonish that:

> The trial judge should be the exemplar of dignity and impartiality. The judge should exercise restraint over his or her conduct and utterances. The judge should suppress personal predilections, and control his or her temper and emotions. The judge should not permit any person in the courtroom to embroil him or her in conflict, and should otherwise avoid personal conduct which tends to demean the proceedings or to undermine judicial authority in the courtroom. When it becomes necessary during the trial for the judge to comment upon the conduct of witnesses, spectators, counsel, or others, or upon the testimony, the judge should do so in a firm, dignified, and restrained manner, avoiding repartee, limiting comments and rulings to what is reasonably required for the orderly progress of the trial, and refraining from unnecessary disparagement of persons or issues.

A complete review of the record in this case reveals that the district court judge departed from the standards of decorum and impartiality required of him. Pet. Br. at

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[14] Importantly, although respondent purports to address each issue raised by petitioners, it ignores several of the most egregious instances of Judge Elliott's conduct. For example, respondent does not dispute that Judge Elliott's disparaging remarks concerning Father Bourgeois' codefendant's invocation of his Fifth Amendment rights were improper. Respondent also apparently agrees that Judge Elliott's finding of "no probable cause" for petitioners' *in forma pauperis* appeal was in error.

28-39. The record, when taken as a whole, reflects an appearance of bias which risks undermining the public's confidence in the judiciary and requires a new trial.

CONCLUSION

For the foregoing reasons, petitioners respectfully request that this Court reverse their convictions and remand their case for retrial before an impartial judge or, in the alternative, reverse their convictions and remand the case to the Eleventh Circuit for a determination as to whether Judge Elliott should have recused himself under 28 U.S.C. §455(a) for judicially-acquired appearance of bias.

Respectfully submitted,

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